

U.S. DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

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THOMAS D. DOMONOSKE, )  
Individually and on the behalf of )  
all those similarly situated, )  
Plaintiff,) CIVIL ACTION NO.  
v. ) 5:08CV00066  
BANK OF AMERICA, N.A., )  
Defendant.)

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MICHAEL F. URBANSKI, JUDGE

Harrisonburg, Virginia

Wednesday, November 18, 2009

11:38 a.m.

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Reported by: L. Michelle Flanary

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1 P R O C E E D I N G S

2 THE COURT: All right. This is the case of  
3 Domonoske versus Bank of America. It's 5:08-CV-00066,  
4 and we've got a hearing this morning on the  
5 preliminary approval of the class action settlement.  
6 And I don't know which -- y'all need to introduce  
7 yourselves so I know who you are, and I guess the  
8 plaintiff's counsel will proceed.

9 MR. BENNETT: Yes, sir.

10 THE COURT: Okay.

11 MR. BENNETT: Your Honor, my name is Leonard  
12 Bennett. My co-counsel at the table is my law  
13 partner, Matthew Erausquin. We both practice at the  
14 Virginia law firm, Consumer Litigation Associates.

15 THE COURT: In Newport News?

16 MR. BENNETT: In Newport News, yes, sir.  
17 Mr. Erausquin is based in Fairfax, and the lion's  
18 share of my Virginia practice is in Eastern District  
19 of Virginia, most of that in Richmond, so this is the  
20 first appearance I've made, other than via telephone  
21 conference call.

22 THE COURT: Yeah, I've talked to you all on  
23 the phone a bunch of times in connection with  
24 scheduling.

25 MR. BENNETT: Yes, sir.

1 THE COURT: Yes.

2 MR. BENNETT: Anyway, thank you very much,  
3 Judge, for accommodating the move to this hearing as  
4 well as my appearance before you.

5 We represent the plaintiffs in this action,  
6 Domonoske v. Bank of America, which has been  
7 consolidated with this Court's entry of the  
8 consolidation order on transfer of venue of Rivera v.  
9 Bank of America from the Eastern District of Virginia.  
10 Those cases have been litigated on relatively parallel  
11 tracks, as well they've been negotiated together.  
12 They both deal with --

13 THE COURT: Is Mr. Rivera a lawyer?

14 MR. BENNETT: No, sir.

15 THE COURT: Is Mr. Domonoske a lawyer?

16 MR. BENNETT: Mr. Domonoske is a lawyer.

17 THE COURT: Here in Harrisonburg?

18 MR. BENNETT: Yes, sir.

19 THE COURT: All right. Go ahead, sir.

20 MR. BENNETT: Again, the distinction between  
21 the two cases, Your Honor, was that the particular  
22 Bank of America mortgage loan product at issue in the  
23 Domonoske case was a -- this subset of total Bank of  
24 America mortgage loans that were home equity line of  
25 credit loans or comparable product; the Rivera was --

1 consisted of loans other than that, conventional  
2 mortgage loans. The two together collectively allege  
3 the same violation, which is provision of the federal  
4 Fair Credit Reporting Act enacted by Congress as  
5 what's referred to, the acronym of FACTA, FACTA  
6 amendments to the Fair Credit Reporting Act in 2003.

7 THE COURT: 1681g(g)?

8 MR. BENNETT: Yes, Your Honor.

9 THE COURT: As soon as reasonably  
10 practicable.

11 MR. BENNETT: Absolutely, Judge, that's the  
12 question, you know, whether the Court has many  
13 opportunities to consider the language that Congress  
14 imposes. Of course, partly tongue in cheek, striving  
15 for legal clarity, as soon as reasonably practicable  
16 was an open question. In fact, that was the primary  
17 defense, at least from my perspective, that we based  
18 from the defendant, whether or not the defendant, in  
19 this instance, Bank of America --

20 THE COURT: And they have two different  
21 scenarios, as I understand it. They have -- I forget  
22 what it's called. They have version one and version  
23 two of the way they did things.

24 MR. BENNETT: Yes, sir. ACAPS is how it's  
25 referred to internally and then Legacy system.

1 THE COURT: Right.

2 MR. BENNETT: And --

3 THE COURT: As I understand ACAPS, the  
4 notice was given when the transaction closed or was  
5 terminated, and then under Legacy, it was like swept  
6 every Thursday or something and then notice was given  
7 the next week.

8 MR. BENNETT: Yes, Your Honor.

9 THE COURT: Do you know where Domonoske or  
10 Rivera fell within either ACAPS or Legacy?

11 MR. BENNETT: Mr. Domonoske fell within  
12 ACAPS; Mr. Rivera fell within Legacy, Judge.

13 THE COURT: What is the argument, that  
14 Legacy is not reasonably practicable?

15 MR. BENNETT: Well, the argument is,  
16 Judge -- and the liability argument is that Bank of  
17 America sent other disclosures -- well, disclosures  
18 that had been in place or required by other federal  
19 laws like RESPA, for example, the Good Faith Estimate  
20 and other -- Truth in Lending Act disclosures. It  
21 sent those documents out just a couple days after the  
22 application process, whereas it would delay this  
23 additional -- the credit score disclosure until  
24 sometime after that, even sweeping it every Thursday,  
25 the as-soon-as-reasonably-practicable, we believed,

1 was disproven by -- or compliance with that term was  
2 disproven by the fact that obviously it was reasonably  
3 practicable to send these additional disclosures out,  
4 as well.

5 THE COURT: So your argument is they sent  
6 other notices; therefore, it was reasonably  
7 practicable to send these FACTA notices?

8 MR. BENNETT: Yes, Your Honor.

9 THE COURT: All right. Now, you're asking  
10 for, as part of this settlement, some injunctive  
11 relief?

12 MR. BENNETT: Yes, Your Honor.

13 THE COURT: You're asking for -- for a year,  
14 I believe, that the Bank of America give notice on  
15 certain terms, and I think -- can you refresh me on  
16 how many days they're required under the injunctive  
17 aspect of this settlement?

18 MR. BENNETT: Judge, under the injunction,  
19 it is three business days.

20 THE COURT: That's what I thought it was,  
21 three days.

22 MR. BENNETT: Yes, sir.

23 THE COURT: So basically, you're saying --  
24 are you saying that three business days is  
25 reasonably -- as soon as reasonably practicable? In



1 fact, the injunction -- the Court must find that. The  
2 Court must find that under the injunction that three  
3 days is as soon as reasonably practicable, right?

4 MR. BENNETT: Yes, sir.

5 THE COURT: And I believe you're saying  
6 seven days is not?

7 MR. BENNETT: We are saying seven days is  
8 not.

9 THE COURT: Your argument is, under the  
10 Legacy system, Mr. Rivera, as class representative  
11 for -- that that's not as soon as reasonably  
12 practicable?

13 MR. BENNETT: That's correct, Judge. And  
14 one of the bases -- and I can recount the  
15 negotiations, and I have had the good fortune of being  
16 lead counsel in a number of class actions, I can  
17 represent to you, Your Honor, and I hope to appear in  
18 front of -- on other cases, certainly, that I don't  
19 recall as contentious a series of negotiations --  
20 professional, amicable as person to person, but there  
21 was --

22 THE COURT: Just because y'all settled with  
23 them doesn't mean the Court has to approve it.

24 MR. BENNETT: Absolutely, Judge. My point  
25 being that one of the more contentious components of

1 this was negotiating the injunction itself.

2 THE COURT: Okay. So you -- okay. So that  
3 aspect was negotiated strongly as well as the amount  
4 of settlement?

5 MR. BENNETT: Absolutely, Judge. And in  
6 fact, to do so -- and Mr. Agoglia can provide you  
7 background, as well, but there -- we actually required  
8 a detailed declaration, as well, there was testimony  
9 of the respective employees, those in charge of these  
10 functions, and as to why mechanically this was the  
11 shortest time possible. It's not simply --

12 THE COURT: Shouldn't the Court have some of  
13 that information before the Court makes a judgment on  
14 the ultimate approval of the class, especially for the  
15 injunctive aspect of this?

16 MR. BENNETT: You should, Judge.

17 THE COURT: I mean, just because you guys --  
18 just because you're satisfied it's as soon as  
19 reasonably practicable, you're asking the Court to  
20 make a judgment that three days is as soon as  
21 reasonably practicable, shouldn't the Court have some  
22 evidence as to that?

23 MR. BENNETT: As a -- yes, conceptually, it  
24 should, and if I could step back, as I disclaim any  
25 direct answer to a judge as I need to. The question

1 here is whether or not on its face this settlement  
2 could pass muster as -- for preliminary approval, we  
3 will have to have an additional and full-blown  
4 fairness hearing in which there is --

5 THE COURT: Oh, I'm not talking about  
6 preliminary approval. I was just sort of talking  
7 about the later hearing.

8 MR. BENNETT: Yes, sir. Before the Court  
9 enters the injunction, which is not -- if the Court  
10 approves this settlement today on preliminary  
11 approval, you are not entering the injunction today.

12 THE COURT: Oh, no, I understand.

13 MR. BENNETT: Yes, sir.

14 THE COURT: I understand how Rule 23 works.

15 MR. BENNETT: Yes, sir, but --

16 THE COURT: I have stood where the lawyers  
17 stand in this case in class actions before.

18 MR. BENNETT: And we -- the class benefits  
19 from that expertise.

20 I -- to answer your question, then, Judge,  
21 yes, you will have to have evidence that this is as  
22 soon as reasonably practicable.

23 THE COURT: Right, because you're asking the  
24 Court to make a legal ruling, and although it's a  
25 concent injunction, you are asking the Court to make a

1 legal ruling that three days is as soon as reasonably  
2 practicable, so the Court would need to hear evidence  
3 to make that -- just because -- just because you guys  
4 have agreed to that doesn't mean that we serve as a  
5 rubber stamp. I mean, we have to -- there has got to  
6 be some basis for it.

7 MR. BENNETT: Absolutely. And to give -- to  
8 flesh this out further for Your Honor, there is -- as  
9 part of this process, there was a detailed affidavit  
10 that explains the whole process. It was consistent  
11 with the deposition testimony, but it was a  
12 declaration, and the question, given the ambition of  
13 Bank of America to retain its internal processes to be  
14 confidential to the extent possible and the possible  
15 conflict with certainly the (inaudible) and local  
16 rule, or at least -- not the -- the local rule, the  
17 Eastern District and this Court's predisposition  
18 against sealing without support, the question was what  
19 to do with the declaration, but Bank of America  
20 committed to the extent, and when the Court needs that  
21 information to consider for the acceptance or  
22 rejection of the injunction that Bank of America was  
23 willing to provide it on record.

24 THE COURT: It's not a question of what this  
25 Court's predisposition is as to sealing; it's what the

1 Fourth Circuit requires as to sealing.

2 MR. BENNETT: Yes, sir.

3 MR. AGOGLIA: I apologize for the  
4 interruption, Your Honor. Michael Agoglia on behalf  
5 of Bank of America.

6 THE COURT: Nice to see you.

7 MR. AGOGLIA: Nice to see you, Judge.

8 Just on that point alone, I believe the --  
9 and I may be wrong, but I believe that the declaration  
10 of Marti Smith was submitted with the settlement  
11 agreement.

12 THE COURT: Yeah, I saw that declaration.

13 MR. AGOGLIA: So --

14 THE COURT: Is that what we're talking  
15 about?

16 MR. AGOGLIA: That's what Mr. Bennett is  
17 referring to. Ms. Smith is the person with the  
18 30(b)(6) deposition witness on how it all works.  
19 She's the person most knowledgeable about how the  
20 system was redesigned. I'll speak to the separate  
21 question you raise about the finding we would ask of  
22 you upon a fairness hearing, but we did --

23 THE COURT: Ultimately, Judge Wilson.

24 MR. AGOGLIA: Or ultimately, Judge Wilson.  
25 (Inaudible) entering that injunction, but we did, I

1 think, submit that declaration with our materials.

2 THE COURT: Thank you. I appreciate that.

3 MR. BENNETT: And I'm sorry, Judge, for --

4 THE COURT: Are you feeling better?

5 MR. AGOGLIA: Your Honor, I am, and I want  
6 to thank you --

7 THE COURT: We don't want anybody who is  
8 sick with the flu to be traveling on a little airplane  
9 across the country and perhaps infecting all the  
10 others, so I was happy to accommodate you.

11 MR. AGOGLIA: And your staff was incredibly  
12 professional and accommodating. Mr. Bennett and his  
13 side, Mr. Cupp, who is your local counsel, agreed to  
14 step aside to allow us to go forward today instead of  
15 December, so I appreciate the courtesy shown all  
16 around there.

17 THE COURT: Happy to --

18 MR. BENNETT: And Judge, and that aside,  
19 just, I would offer, to the extent it hurt Mr. Cupp's  
20 (inaudible) he had a conflict today, the only other  
21 stars-aligned date that was available would have put  
22 us in December and we were concerned about --

23 THE COURT: Not a problem. Not a problem.

24 MR. BENNETT: Yes, sir.

25 The injunction, as Your Honor correctly

1 surmises, requires more than a rubber stamp. It  
2 would -- we, in fact, the entirety of the settlement  
3 requires the Court's analysis and consideration in  
4 negotiating, as the Court recalls from sitting on this  
5 side of the courtroom. Whether or not it's a fair  
6 deal is not our ultimate decision. Our advice as to  
7 fairness or adequacies is just one factor. An  
8 important one under -- but one factor. And when we  
9 negotiate any term of this, it's critical that we  
10 negotiate it for you and for Judge Wilson and your  
11 consideration.

12 The additional background, Your Honor, that  
13 is outside the pleadings, if the Court please -- and I  
14 can argue it point by point, but in terms of  
15 negotiating the attorneys' fees, Your Honor is  
16 presented with a 9.95 number.

17 THE COURT: Which is on a class of three --  
18 a potential class of 3.5 million people?

19 MR. BENNETT: Yes, sir. The --

20 THE COURT: So it's -- if you do the math,  
21 it's something less than \$3 a head.

22 MR. BENNETT: It would be.

23 THE COURT: If 100 percent of the class  
24 members sign up. And as I understand the class  
25 compensation, it is up to \$100.

1 MR. BENNETT: Yes, sir.

2 THE COURT: And it is -- and it scales back  
3 based on the number of people who sign up. Obviously,  
4 a lot of people will just throw the notices away and  
5 not pay a bit of attention to it, but a max of 100 and  
6 I think the papers said maybe a minimum of \$2?

7 MR. BENNETT: Yes, sir, if everyone does it.

8 THE COURT: Right.

9 MR. BENNETT: The two additional factors,  
10 which to highlight in terms of the process, the  
11 original settlement was actually 7 million and change,  
12 and that was negotiated without a discussion of  
13 attorneys' fees. We didn't negotiate attorneys' fees  
14 at that point. We ultimately presented this -- we --  
15 I'm sorry. The -- we had intended to present a  
16 settlement of 9.4 million gross to include the  
17 defendant's consent to our asking the Court for up to  
18 a 25-percent fee, but we then negotiated additional  
19 money based on the savings of notice. The original  
20 settlement would have permitted a per person or  
21 per-transaction distribution without the consumer or  
22 the class member having to affirmatively act on it.  
23 It would have been the \$2 or approximately.

24 There is significant notice savings that  
25 have been reached in discussions with Rust



1 Consulting and the defendants. Those additional  
2 savings are what bumped it from the 9.4 up to 9.95.  
3 We, as part of that -- and not just for the Court, but  
4 to convey to the defendant what we were negotiating in  
5 that second stage, (inaudible) closed settlement  
6 stage, our sincerity of our interest for the class  
7 said that we would not ask for any attorneys' fees for  
8 the 9. -- for the additional five -- approximately  
9 \$500,000, that that savings --

10 THE COURT: Right. So the 2.4 or whatever  
11 it is you're asking for is actually less than 25  
12 percent.

13 MR. BENNETT: Yes, sir.

14 THE COURT: Now, who is paying the cost of  
15 the class administration?

16 MR. BENNETT: The defendant --

17 THE COURT: Is that in addition to the 9.9?

18 MR. BENNETT: It's in addition, yes, sir.

19 THE COURT: All right. And you're using  
20 this Rust Consulting Group to do the notices and  
21 administer it and figure out who is in and who is out  
22 and all those things?

23 MR. BENNETT: Yes, Judge, and we have --

24 THE COURT: That's the proposal?

25 MR. BENNETT: Yes. I have previous

1 experience with Rust in another case, including --  
2 there was a \$22 million settlement negotiation out of  
3 Eastern District of Virginia. It was actually a  
4 contested certification and survived a 23-F appeal  
5 before the Circuit and Rust administered that class  
6 effectively. Rust is sort of the Cadillac version  
7 of -- or gold standard of administrative consultants,  
8 and it was a material condition of our negotiation  
9 that defendant absorb the expense of that.

10 THE COURT: So the defendants are in for, if  
11 this settlement is approved, 9.9 million and change  
12 plus the cost of administration?

13 MR. BENNETT: Yes, sir, and they are --

14 THE COURT: And the attorneys' fees comes  
15 out of the 9.9 million?

16 MR. BENNETT: The 9.4 million.

17 THE COURT: 9.4?

18 MR. BENNETT: Well, it comes out -- I'm  
19 sorry. 9.5. It does come out of 9.95.

20 THE COURT: I thought it was 9.95.

21 MR. BENNETT: It is. We -- it is 9.95.

22 THE COURT: But the attorneys' fees are a  
23 percentage of 9.4?

24 MR. BENNETT: Yes, sir.

25 THE COURT: That's what you're telling me?

1 MR. BENNETT: That's what I'm telling you.

2 THE COURT: But the attorneys' fees are not  
3 over and on top of the 9.9?

4 MR. BENNETT: No, sir, they're not. They  
5 are over and on top the original negotiation amount of  
6 a little over 7 million. The attorneys' fees were  
7 added on top of that.

8 THE COURT: All right. Go ahead.

9 MR. BENNETT: The -- in addition to merits  
10 defenses, and the defendants can speak to these, as  
11 well, certainly, or even better than I, but, of  
12 course, we would have to show that there was a willful  
13 violation of the statute, something in the beginning  
14 of the case in posturing by the plaintiff's counsel,  
15 I'm always optimistic about in my public statements,  
16 but it's a challenge to show entitlement to -- to add  
17 a threshold.

18 THE COURT: Especially with how much trouble  
19 it looks like they went to to try to comply with the  
20 law. I mean, they had -- I mean, these two iterations  
21 and under ACAPS and Legacy, it looks like, at least  
22 from the papers you presented, they spent a lot of  
23 time, effort and money to try to comply with the law,  
24 and I guess it would be your burden to prove that,  
25 notwithstanding, it was a willful violation.

1 MR. BENNETT: Yes, sir, that would be our  
2 burden.

3 The dollar amount -- assume, in terms of  
4 injury, not actual damages, but just in terms of the  
5 inequitable appreciation or appreciation of the  
6 equitable value of this, the cost of the credit score,  
7 if somebody were to buy -- wanted to (inaudible) and  
8 said, Look, you're not giving me my score in time.  
9 I'm going on the Internet and I'm buying the score,  
10 it's \$6, by federal regulation, and so the --

11 THE COURT: What actual damages does  
12 Mr. Rivera have?

13 MR. BENNETT: He would have injury in that  
14 same range. He does not --

15 THE COURT: What actual damages do you have  
16 that -- to satisfy the typicality requirement that  
17 Mr. Rivera has?

18 MR. BENNETT: We do not allege actual  
19 damages for Mr. Rivera.

20 THE COURT: What about Mr. Domonoske?

21 MR. BENNETT: We do not allege actual  
22 damages for Mr. Domonoske.

23 THE COURT: So they don't have any actual  
24 damages?

25 MR. BENNETT: Not that we could establish by

1 causation, Judge. There was a -- the Seventh Circuit  
2 decision, which has been cited in other Virginia  
3 courts, the Murray versus GMAC case considered  
4 circumstances like these where there is a violation of  
5 statute, it does inflict injury or harm, but the  
6 denial of those rights is not a challenge to prove  
7 causation and establish actual damages, and in fact,  
8 in that case, the Seventh Circuit provided its seal of  
9 approval on class action remedy as a mechanism to  
10 enforce Fair Credit Reporting Act violations such as  
11 these.

12 THE COURT: Was that under this statute or  
13 was that under debt collection?

14 MR. BENNETT: Under this statute, Judge.

15 THE COURT: Under this statute. All right.

16 MR. BENNETT: And it's the primary -- it's  
17 the Seventh Circuit, but it's the primary law on the  
18 question of proceeding under the Fair Credit Reporting  
19 Act without actual damages in a class basis and the  
20 extent of analysis as the circumstances. In that  
21 case, the fact pattern was an impermissible pool  
22 claims where the entity had been alleged to have  
23 unlawfully accessed a consumer report. The  
24 analysis -- it describes any circumstance in which  
25 it -- the establishment of actual damages, and

1 certainly, measurable actual damages, liquidatable  
2 actual damages is difficult if not impossible.

3 THE COURT: For a willful violation, though,  
4 don't you just need to prove actual damages or prove  
5 the ability to get a statutory penalty of not less  
6 than 100 but not more than a thousand?

7 MR. BENNETT: Yes, sir.

8 THE COURT: Isn't that right?

9 MR. BENNETT: That is right.

10 THE COURT: Isn't that the big problem for  
11 the defendants in this case --

12 MR. BENNETT: That is.

13 THE COURT: -- is the statutory penalty?

14 MR. BENNETT: It is, Judge.

15 THE COURT: And in this case, if you were  
16 actually able to prove a willful violation in this  
17 case would a statutory penalty of \$100 -- they're  
18 settling, essentially, with 9.95 or so, for a little  
19 less than \$3 a head on a class of 3.5; is that fair or  
20 is my math wrong?

21 MR. BENNETT: Your math is correct. There  
22 are additional issues, which I -- I'm not (inaudible),  
23 but this very case I described, Murray versus GMAC,  
24 dealt with the due process argument, the -- whether or  
25 not the punishment meets the crime, so to speak. The

1 Court is familiar, of course, with the jurisprudence  
2 coming out of the U.S. supreme Court as it pertains to  
3 punitive damages, and the argument that some  
4 defendants had made was that if the statutory damages  
5 uncapped by -- unlike the Fair Credit Reporting Act or  
6 Equal Credit Opportunity Act, which are capped at one  
7 percent --

8 THE COURT: That's exactly right. Yeah, I'm  
9 familiar with that.

10 MR. BENNETT: And so the Fair Credit  
11 Reporting Act doesn't have such a cap, and some of the  
12 defense arguments, including --

13 THE COURT: I mean, it could be way out  
14 there. I mean, if you go \$1,000 a head on 3.5 million  
15 people, Bank of America ceases to exist.

16 MR. BENNETT: Yes, sir. And --

17 THE COURT: Well, I mean, I'm exaggerating,  
18 but it would be a big chunk of money.

19 MR. BENNETT: That's -- well, we'd have to  
20 go back, I'm sure, to the U.S. treasury for a relief,  
21 tongue in cheek.

22 The question, then, is what -- the mechanism  
23 that a judge like Your Honor would use to --

24 THE COURT: Go to the due process issue.

25 MR. BENNETT: The due process issue is

1 whether or not the amount of money to be awarded for  
2 the willful violation of statutes would be -- would  
3 annihilate the defendant or would be -- violate due  
4 process by forcing it to settle because of the fear of  
5 annihilation, and so that --

6 THE COURT: Right.

7 MR. BENNETT: -- the legal question that's  
8 considered in part in Murray is whether or not the  
9 Court would exercise a right to sort of pre-remit or  
10 whether it would remit like the Leatherman due process  
11 analysis for punitive damage claims after the fact,  
12 and Murray, which has been adopted in the courts in  
13 our state, has -- holds that this court would come in  
14 after the fact, after result in a class action and  
15 appropriately apply due process to remit. Either way,  
16 we would face not simply the hurdles of proving  
17 willfulness; we would face the defense argument that  
18 the Court should remit the amount of the award in  
19 conformance with due process.

20 So it -- as much as I would posture in  
21 settlement of any of these cases that, you know, we  
22 think we could get \$1,000 for each 3 million people,  
23 I'm a realist, Judge.

24 THE COURT: Right.

25 Now, what -- isn't this \$6 a head just a



1 fiction? \$6 that someone could have gotten -- or  
2 could have been charged if they went to Experian and  
3 asked for their own credit report? I mean, what you  
4 said, Rivera and Domonoske didn't do it. Isn't this  
5 \$6 just a fiction?

6 MR. BENNETT: It's the closest and the most,  
7 I think, rational way to liquidate the right that's at  
8 issue in the case. Now, whether it's a fiction --  
9 well, there are individuals, Judge -- let's -- if you  
10 take the circumstances of a class member who had  
11 perfect credit and got the very best rate that Bank of  
12 America could offer and the score would have shown  
13 that they were 800, then it's a violation of a right,  
14 and Congress has set that right, FDC has priced it at  
15 \$6. But in terms of what would get me as a  
16 plaintiff's lawyer excited enough to go make arguments  
17 in Federal Court? If I was -- if the class was full  
18 of those individuals, then --

19 THE COURT: With no damages.

20 MR. BENNETT: There are other wrongs to  
21 right out there.

22 THE COURT: Right. No damages.

23 MR. BENNETT: That's right, but there are  
24 other individuals that might have wanted the score.  
25 One of the significant reasons besides incentivizing

1 individuals to contact by using the up to \$100 amount,  
2 but one of the other reasons to have the structure for  
3 settlement distribution that is ultimately negotiated  
4 and we present to Your Honor asking for preliminary  
5 approval on is that some individuals would care about  
6 this. It might have impacted them in at least some  
7 fashion and they might have requested such a score,  
8 and even though those actual damages might not be --  
9 you might not be able to prove causation and all of  
10 the things that in a full jury trial would matter, but  
11 at least in terms of basic fairness, the  
12 considerations that we have as advocates for the  
13 class, it makes sense that we provide a mechanism that  
14 allows individuals to stand up and say, Yes, I would  
15 have wanted that. So to answer your question, Judge,  
16 is it a fiction, I don't know that it's a fiction, but  
17 it's also not as meaningful a right for some  
18 individuals as for others.

19 THE COURT: How -- well, if that's the case,  
20 if it's not as meaningful a right for some as for  
21 others, and therefore -- I mean, doesn't that argue  
22 that there is no commonality? Doesn't that argue that  
23 not everybody would want to be or should be -- have  
24 the same interest here?

25 MR. BENNETT: No, sir, it wouldn't. It

1 would be -- the right exists. The violation exists.  
2 It would be no different in any class -- in fact, in  
3 some of our class actions, including cases in which we  
4 have -- where accuracy was at issue and we were able  
5 to have more significant dollars that we could send  
6 out, we've had individuals that wrote in and opted out  
7 and the explanation for the opt out is, I don't like  
8 class actions. And that's -- and there are certainly  
9 enough of -- I'm on the board of directors of the  
10 National Association of Consumer Advocates. We have  
11 enacted class action guidelines and we deal with, we  
12 think, class action abuse often enough and combating  
13 it as best as we can, and so I understand that  
14 concern. To say that there would not be commonality  
15 between person A that is motivated to enforce a right  
16 that exists in common with person B who would be more  
17 motivated because maybe they cared more about the  
18 score, their rights are the same, the violation is the  
19 same, the determination of liability is the same, but  
20 the motivation is not a commonality, typicality or  
21 even -- or --

22 THE COURT: Even if it's somebody who got  
23 the loan they applied for versus someone who didn't  
24 get the loan they applied for?

25 MR. BENNETT: Yes, sir, the right --

1 THE COURT: Is there commonality there?

2 MR. BENNETT: There is, yes, sir. The --  
3 it's the right and the right to recover is exactly the  
4 same. It's not simply close enough for horseshoes,  
5 but it is.

6 THE COURT: Well, why is there damages? I  
7 mean, if somebody applies for a loan, gets the loan  
8 and maybe gets the notice a week later, how is that  
9 person harmed in any respect?

10 MR. BENNETT: That would be a policy  
11 question, Judge. I mean, if the statute is violated,  
12 these rights exist independent of that. Now, if I  
13 were representing an individual who came to me merely  
14 for that reason and didn't -- wasn't otherwise able to  
15 help the classes as we think we will here, I don't  
16 know that that's -- that would equitably motivate me.  
17 It's a decision given our --

18 THE COURT: Of course not. I mean, doesn't  
19 that argue for class action consideration in this  
20 case?

21 MR. BENNETT: Yes, sir, it does.

22 THE COURT: Because somebody who has got a  
23 \$6 damage claim isn't going to bring it. The only way  
24 this case is going to get brought is as a class  
25 action.

1 MR. BENNETT: Yes, sir.

2 THE COURT: Isn't that your argument?

3 MR. BENNETT: It is, and that's -- again,  
4 reciting the Murray v. GMAC case, that's outlined at  
5 length in the Fourth Circuit. The Fourth Circuit has  
6 recognized the importance of class -- in fact, the  
7 U.S. Supreme Court discusses it for consumer cases.

8 THE COURT: Do we know how many of the 3.5  
9 million are in the ACAPS versus the Legacy?

10 MR. BENNETT: We do, Judge, and Mr. Agoglia  
11 might have something more handy, but it is -- I want  
12 to say -- it's not exactly half, but it is within a  
13 range that the Court saw as approximately half one and  
14 half the other. It might be off by a hundred or a  
15 couple hundred thousand in one direction or the other,  
16 but we do have a specific number, and with time, I can  
17 pull it out for you, but --

18 THE COURT: Go ahead.

19 MR. BENNETT: The additional considerations,  
20 Your Honor --

21 THE COURT: Well, let me ask you another  
22 question.

23 MR. BENNETT: Yes, sir.

24 THE COURT: Sorry.

25 As regards -- and so you don't know, as

1 regards this 3.5 million, how many of these loans  
2 closed versus how many of these loans didn't close?

3 MR. BENNETT: Again, that -- in the  
4 discovery process, that has been -- there is evidence  
5 that we can access as to that. It would be, again, a  
6 question I would have to either take a moment on or  
7 defer to Mr. Agoglia.

8 THE COURT: And your argument, though,  
9 Mr. Bennett, is it's immaterial to the analysis of  
10 the --

11 MR. BENNETT: Absolutely, Judge, that is my  
12 argument.

13 THE COURT: Okay. Some people, you know --  
14 because I could see some folks under the ACAPS system  
15 going through a loan process, whether it's for a new  
16 house loan or whether it's for a line of credit on  
17 their mortgage and then -- going through the process,  
18 getting turned down, then getting notice that they  
19 used this credit score, having some issue with it and  
20 thinking, If I had known they were going to get it, I  
21 would have made some efforts to change some things or  
22 talked to the bank and -- but then it's too late  
23 because the loan has closed and they've been rejected.

24 MR. BENNETT: Yes, Your Honor.

25 THE COURT: And -- but what you're saying is

1 Congress has made that policy judgment already, and  
2 that regardless of whether the loans closed or didn't  
3 close, that's not a part of the statute that the Court  
4 should think about. Congress made the policy  
5 judgment.

6 MR. BENNETT: That's correct, and I can  
7 offer a second response.

8 THE COURT: All right. Go ahead.

9 MR. BENNETT: The class notice that is  
10 proffered is, I think, unique to the form notices that  
11 Your Honor might have seen in other class actions in  
12 that we have gone to even greater detail than normal  
13 to explain what the lawsuit is about. You actually  
14 see -- it's Exhibit B to our motion right after the  
15 settlement agreement, but -- or memorandum, but the  
16 class notice has, first section, What is this --  
17 number one, I mean, What is this lawsuit about? And  
18 then we outline the facts, the background facts, what  
19 the law requires and what remedies are available, what  
20 the plaintiffs allege and how Bank of America  
21 responded. We also have negotiated a claims form that  
22 would facilitate -- and as well as a process online  
23 that would facilitate the consumer learning as much  
24 about these rights as possible, and we have negotiated  
25 a five percent opt-out rate, which is a large number

1 of individuals. I don't suggest that --

2 THE COURT: In other words, if five percent  
3 opt out, the defendant could pull the plug on the  
4 settlement?

5 MR. BENNETT: Yes, sir, which means a lot of  
6 individuals. If somebody is in a circumstance where  
7 they actually believe that they are unique and that  
8 they can present actual damages or certain  
9 jurisprudence as well as other courts have supported  
10 the opt-out for those outliers. The question Your  
11 Honor considers is whether or not they're outliers or  
12 whether or not it's, you know, the -- those  
13 individuals actually benefiting are the exception. In  
14 this circumstance, Judge, the -- it would be quite a  
15 challenge to prove actual damages in any of these  
16 instances, even if they existed. If I could  
17 articulate with Your Honor, Your Honor, of course, has  
18 had more litigation experience than I do, you're  
19 familiar with the challenge of putting on evidence,  
20 and so --

21 THE COURT: I think proving actual damages  
22 is really hard in this case.

23 MR. BENNETT: Yes, sir. The -- so that in  
24 that unusual circumstance, there is that safety valve  
25 for that outlier who would fit that scenario -- we



1 think unusual scenario that Your Honor suggests, so --  
2 I'm very proud of the settlement if we can get  
3 approval on it, Judge. I believe that's a just  
4 result. You have the say and Judge Wilson has the  
5 say, not I, but this is a settlement that -- I teach  
6 this stuff -- the Fair Credit Reporting Act stuff  
7 around the country. I'm supposed to be one of the  
8 go-to guys, and I could not advocate a settlement --  
9 an actual settlement that I could not stand up for,  
10 and this is one I certainly can stand up for, for what  
11 that's worth, Judge.

12 THE COURT: All right. Well, I have a  
13 couple of questions.

14 MR. BENNETT: Yes, sir.

15 THE COURT: The settlement provides that the  
16 class representatives are to get, in addition to  
17 whatever the other members of the class get, to get a  
18 \$5,000 stipend; is that right?

19 MR. BENNETT: Yes, sir.

20 THE COURT: Is there any provision for the  
21 sharing of attorneys' fees with Mr. Domonoske?

22 MR. BENNETT: No, sir, none at all, and in  
23 fact, when we learned about -- just to give the Court  
24 more background. When Mr. Domonoske first learned  
25 about this and sought legal help -- and he himself is

1 one of the top consumer lawyers in the country. I --

2 THE COURT: That's why I asked the question.

3 MR. BENNETT: Yes, sir.

4 I wanted him to say, Look, you don't need to  
5 be a representative.

6 THE COURT: Wouldn't he be much better off  
7 being --

8 MR. BENNETT: Significantly.

9 THE COURT: -- standing there right there  
10 with getting -- or petitioning for these kind of  
11 attorneys' fees than getting his little \$5,000?

12 MR. BENNETT: Significantly better off  
13 financially. I -- Mr. Domonoske, Judge --

14 THE COURT: That's why I asked the question.  
15 Is there some deal, unwritten, written, understanding,  
16 otherwise, in which either Rivera or Domonoske are  
17 going to benefit from this other than is set forth in  
18 these papers?

19 MR. BENNETT: No, sir, nothing at all, on my  
20 law license. There is nothing --

21 THE COURT: Well, now, that -- everything  
22 you say here is on that.

23 MR. BENNETT: Yes, sir.

24 THE COURT: I'm just asking the question.

25 MR. BENNETT: The -- there is absolutely

1 none, and I can tell you, and I'm certain, and  
2 frankly, Mr. Agoglia has -- Mr. Domonoske's  
3 representation of the class in this case has been as  
4 diligent as any class representative could ever be.  
5 He has even insisted, because of an interpretation he  
6 had of a Fourth Circuit case in which the attorneys  
7 advanced costs in the case, he has insisted that he  
8 subsidize and pay himself all of the costs. He has  
9 himself shelled out approximately \$12,000 and  
10 change --

11 THE COURT: Well, yeah, he gets the stipend  
12 plus whatever costs he has expended.

13 MR. BENNETT: Yes, he has written a check --

14 THE COURT: So he has done that himself?

15 MR. BENNETT: He has, because of principle,  
16 and it -- and I can tell you, Judge, that if we were  
17 to after the fact offer Mr. Domonoske money, he would  
18 be -- it would damage our relationship irreparably.  
19 He is not -- he would not accept offers.

20 THE COURT: I'm not suggesting that he or  
21 you are doing anything untoward. I'm just asking the  
22 question.

23 MR. BENNETT: And I'm just trying -- because  
24 this is such a -- I could answer that with Mr. Rivera  
25 by saying, There is no such thing, and -- at all.

1 With Mr. Domonoske, it's -- there is no such thing,  
2 plus he has been remarkably involved in protecting the  
3 class, to his own detriment. I know that he will  
4 appear before Your Honor on other cases. I want to  
5 make sure the Court understood that he has not done  
6 this with self-interest at all, and, in fact, did not  
7 say to us, Please negotiate me an incentive award.  
8 Mr. Domonoske and Mr. Rivera both have been very  
9 active in our litigation. They've very effective  
10 representatives.

11 THE COURT: I've deposed close action reps  
12 and they didn't even know the case was going on  
13 hardly.

14 MR. BENNETT: Yes, sir.

15 THE COURT: It was just -- it was --  
16 frankly, it was a matter of curiosity to me,  
17 because -- and we'll talk about the attorneys' fees in  
18 a minute, because the attorneys' fee aspect of this is  
19 far larger -- far, far, far larger than the \$5,000 he  
20 would get, so I was simply asking the question --

21 MR. BENNETT: Yes, sir.

22 THE COURT: -- and I'm satisfied with your  
23 answer.

24 MR. BENNETT: Thank you, Judge.

25 THE COURT: All right. Now, you've taken

1 three depositions in this case, you've reviewed about  
2 10,000 documents and issued one third party subpoena.  
3 That's what your papers say. How can you possibly  
4 justify attorneys' fees in the range of \$2.4 million?

5 MR. BENNETT: Well, the -- first, the  
6 discovery itself and the -- was much broader. The  
7 number of documents involved and the work that was  
8 actually done independent of the deposition, defending  
9 and taking, was much greater, similarly the  
10 negotiation process and the trips to San Francisco and  
11 the multiple sessions attempting to negotiate the  
12 settlement and other work that will be handled through  
13 the end of the case as individuals inquire not simply  
14 of Rust but of us will be much greater and will be  
15 summarized in that fashion. But even still, Judge, we  
16 would not be able to submit a straight time fee  
17 petition to Your Honor for \$2.5 million even with the  
18 considerable work of the different -- two different  
19 federal cases litigated in the two different courts.  
20 However, the Court -- this Court --

21 THE COURT: Have you kept time records?

22 MR. BENNETT: We have, sir. We have kept  
23 time records.

24 The -- and we would contemplate that we  
25 would present that to Your Honor or Judge Wilson with

1 the -- at the final fairness hearing, but independent  
2 of that, the Court --

3 THE COURT: Well, I'm going to ask for it  
4 now. I want affidavits and -- as to the time spent  
5 from all the lawyers in this case on plaintiff's side.

6 MR. BENNETT: Yes, sir, yes, sir. And when  
7 would you like that?

8 THE COURT: When can you have it to me?

9 MR. BENNETT: Early December, Judge.

10 We -- I mean, by preliminarily approving  
11 this, you're not approving fees at this point. We  
12 would appreciate --

13 THE COURT: I know, but if I'm going to  
14 preliminarily approve the class -- I understand I'm  
15 not approving fees at this point, but I've got to tell  
16 you, the \$2.4 million in attorneys' fees versus a max  
17 of \$100 per class representative is an awful lot of  
18 money.

19 MR. BENNETT: It's -- actually, Judge --

20 THE COURT: It's an awful lot of money.

21 MR. BENNETT: -- in any class recovery --  
22 really, in any normal class recovery --

23 THE COURT: It's an awful lot of money.

24 MR. BENNETT: Judge, the living that we make  
25 as attorneys is an awful lot compared to most folks

1 out there, at least most attorneys. Now, the  
2 percentage --

3 THE COURT: Okay. By December 10th, just  
4 get me an affidavit with the time and billing  
5 statements spent on this case from the lawyers on the  
6 plaintiff's side.

7 MR. BENNETT: Yes, sir.

8 THE COURT: Can you do that by December  
9 10th? You said early December.

10 MR. BENNETT: Yes, sir.

11 THE COURT: Do you want me to order you  
12 to -- you can give them to me as soon as you want.

13 MR. BENNETT: Yeah, I was thinking, Judge --  
14 well, we can try to get it by December 10th. I'm  
15 speaking on behalf of other lawyers, as well, and over  
16 the --

17 THE COURT: Well, if they can't get it by  
18 then, just let me know and I'll extend it later.

19 MR. BENNETT: Yes, sir.

20 THE COURT: I mean, I don't want to put you  
21 to any undue burden, but you are asking the Court to  
22 approve settlement of \$2.4 million.

23 MR. BENNETT: Not yet, Judge.

24 THE COURT: I know not yet, but you're  
25 asking me to give preliminary approval to a class

1 and -- for the purposes of settling it, and the  
2 settlement includes an attorneys' fees payment of \$2.4  
3 million for taking three depositions, looking at  
4 10,000 documents and reviewing one third party  
5 subpoena. It seems like a pretty good payday to me,  
6 Mr. Bennett.

7 MR. BENNETT: It is a good payday, Judge,  
8 and I've been fortunate to have good paydays. I will  
9 suggest, though, that that's sort of the --

10 THE COURT: It may be the cart before the  
11 horse.

12 MR. BENNETT: Well, it's not --

13 THE COURT: It may be the cart before the  
14 horse for what I'm doing, okay? I'm just here asking  
15 questions.

16 MR. BENNETT: The reason I'm saying this,  
17 Judge, is that earlier I answered the -- this is just  
18 preliminary approval on the injunction question, but  
19 in this instance, even the preliminary approval is not  
20 approving 25 percent fees, although I absolutely think  
21 that that's a fair fee and I'll defend that fee, Your  
22 Honor, based on the case law regarding the percentage  
23 of cost recovery. The common fund percentage is the  
24 jurisprudence in the Fourth Circuit, and the -- and  
25 we've been approved at 25 to 30 percent in other



1 cases. Mr. Domonoske refused to approve a settlement  
2 agreement that would have allowed a range of 25 to 30.  
3 What we had done in our previous class cases --

4 THE COURT: In this case?

5 MR. BENNETT: In this case.

6 What we've previously done is ask for a  
7 midpoint between the 25 and 30 that's been approved by  
8 other judges, and the -- Your Honor has that say.  
9 This is your case and Judge Wilson's case. But at  
10 this point, we're not even asking for you to approve a  
11 settlement that approves fees in principle. Instead,  
12 all it simply says is that we will seek attorneys'  
13 fees, the defendant will not oppose attorneys' fees up  
14 to 25 percent, and so conceivably, although, I'll  
15 represent, very unlikely, we could ask for another  
16 percentage now instead of 25 percent. We --  
17 certainly, I'll do whatever Your Honor wants,  
18 including provide those affidavits, but the --

19 THE COURT: By December 10th.

20 MR. BENNETT: By December 10th, Judge.

21 The question is whether or not the  
22 percentage of common fund, which is the Fourth  
23 Circuit's process for determining fees, and, in fact,  
24 it's the majority now, and it has been -- has become  
25 the majority, the way the class action decisions have

1 gone around the country, including, of course, in our  
2 circuit, have gone in that direction, so it's not a  
3 normal Lodestar determination, but the truth is, I  
4 have to impress Your Honor to approve what is a lot of  
5 money, and I have to impress that we represented the  
6 class, that we benefited the class and that --

7 THE COURT: Or that there is even an  
8 appropriate class here.

9 MR. BENNETT: Or that there is an  
10 appropriate class here. We have to -- and the more --  
11 I don't want this, but --

12 THE COURT: And I wonder about whether there  
13 is an appropriate class here since you don't know what  
14 percentage of the loans were approved, what percentage  
15 of the loans weren't approved, what percentage of  
16 these folks would have sustained any actual damages at  
17 all, Mr. Rivera, Mr. Domonoske don't have any actual  
18 damages. I'll look at your Murray case, but I just  
19 wonder if this is an appropriate class here.

20 MR. BENNETT: Well, Judge, those -- we do  
21 have that information. The problem is my personal  
22 preparation for this hearing, because I, in my mind,  
23 marginalized -- apparently, improperly marginalized  
24 the importance of those facts in preparation for this  
25 argument, but the -- it would not be correct to say

1 that we didn't obtain that information or that it's  
2 not otherwise available to Your Honor, part of this  
3 process.

4 In addition, Judge --

5 THE COURT: Do you get any damages under  
6 this statute if it's merely negligent as opposed to  
7 willful?

8 MR. BENNETT: You get actual damages, Judge.

9 THE COURT: You get actual damages?

10 MR. BENNETT: Yes.

11 THE COURT: And you recognize that that  
12 would be next to impossible to prove?

13 MR. BENNETT: That on a class basis --

14 THE COURT: On a class basis, how do you  
15 prove actual damages, because in that case, there is  
16 no commonality?

17 MR. BENNETT: Well, we would have to argue  
18 the loss as a credit score of a \$6 loss. That would  
19 be the mechanism.

20 THE COURT: But you're presuming that  
21 someone would spend the \$6 to get a credit score if  
22 the bank didn't provide it to them in a time period  
23 that is as soon as reasonably practicable.

24 MR. BENNETT: Well, not necessarily. What  
25 we would be presuming is that we -- the consumer -- a

1 factfinder or to get to a factfinder by dispositive  
2 motions that the -- that a market or economic value of  
3 the right that is at issue in this instance is \$6.  
4 That's what we'd have to --

5 THE COURT: That's the argument?

6 MR. BENNETT: Yes, sir.

7 THE COURT: Okay. All right.

8 MR. BENNETT: And so that would --

9 THE COURT: So the economic value of what  
10 was not provided in a timely manner was \$6?

11 MR. BENNETT: Yes, sir.

12 THE COURT: Because they could have got it  
13 themselves by going to Experian for \$6.

14 MR. BENNETT: Yes. And so to say that, you  
15 know, I suffered \$100,000 of damages wouldn't sell  
16 when they could have --

17 THE COURT: Gotten their own --

18 MR. BENNETT: -- gotten their own score for  
19 \$6.

20 One of the advantages, again, though, is  
21 that all of these individuals that received these  
22 notices -- I mean, the notices, costing maybe as much  
23 as \$7 million for the notice administration process,  
24 certainly a couple million dollars, these notices will  
25 have the additional benefit of informing each of these

1 individuals that received a notice, for those that  
2 will read page one of it, that the -- of these rights  
3 and of their entitlement to these rights, not simply  
4 with respect to Bank of America, but with respect to  
5 many mortgage applications made by these folks.

6 The -- one other caveat, Judge --

7 THE COURT: This is -- and this is -- each  
8 member of the class is a member of the class for each  
9 loan that they processed through Bank of America, so  
10 one person may have -- if they process five or six  
11 loans, they have a piece of this five or six times; is  
12 that right?

13 MR. BENNETT: Yes, generally, Judge.

14 THE COURT: I mean, it's per person per  
15 loan?

16 MR. BENNETT: Yes, sir, per person per loan,  
17 right.

18 THE COURT: Per person for notice not  
19 provided in a time that's reasonably practicable.

20 MR. BENNETT: Yes, sir.

21 THE COURT: All right. So one person could  
22 maybe get -- you know, if it was five loans and they  
23 get \$2 a piece, they could get \$10 of this settlement,  
24 right?

25 MR. BENNETT: Well, they're going to receive

1 a single notice.

2 THE COURT: No, no, I'm talking about notice  
3 that they didn't get under the fair credit statute,  
4 okay? They applied for five loans. Let's assume  
5 everybody in the class submits notices, okay? One  
6 person -- one person applied for five loans. They  
7 could conceivably be entitled to \$2 times five --

8 MR. BENNETT: Yes, sir.

9 THE COURT: For each -- for five violations,  
10 right?

11 MR. BENNETT: For each transaction.

12 THE COURT: Each transaction, each alleged  
13 violation, each failure to provide notice as soon as  
14 reasonably practicable, right?

15 MR. BENNETT: Yes, sir.

16 THE COURT: All right. And if a much  
17 smaller percentage does it, then it could be up to  
18 \$100, right?

19 MR. BENNETT: Yes, sir.

20 THE COURT: So this person applies for five  
21 loans, doesn't get the notice, maybe gets \$500. That  
22 would be an unusually large class member.

23 MR. BENNETT: Yes, sir.

24 THE COURT: And you get 2.4 million.

25 MR. BENNETT: We get \$25 for that \$100 that

1     they receive, Judge, and for each individual that's  
2     out there. I mean, the argument -- the concern -- and  
3     I'm not naive to the concerns, but it's the same  
4     concerns as any contingency practice, if we were to  
5     have represented each of these individuals. We do  
6     quality work and we obtain good results, Judge.  
7     That's --

8                 THE COURT: I'm not saying this isn't a good  
9     result for you, Mr. Bennett.

10                MR. BENNETT: Well, I -- just to provide the  
11     same -- the --

12                THE COURT: But in a contingency practice,  
13     your individual client is going to get 66 percent. In  
14     this case, the collective individual client gets that,  
15     gets 75 percent --

16                MR. BENNETT: Gets 75 --

17                THE COURT: -- or a little more than that.

18                MR. BENNETT: Yes, sir, Judge.

19                And I'd also -- just in terms of background  
20     so that -- I mean, this is -- we're the same firm that  
21     does ridiculous amounts of pro bono mortgage defense  
22     work and other stuff, too. I mean, this is not -- we  
23     don't run around with --

24                THE COURT: This is not an assessment of  
25     your character or anyone else's character. I'm just

1     trying to see whether or not that's a -- just trying  
2     to gather as much information I can so I can look at  
3     this matter to see whether or not the class should be  
4     preliminarily approved. That's what -- I'm just --  
5     I'm just asking questions.

6                 MR. BENNETT: Yes, sir, yes, sir, I  
7     understand. My -- it's just a general defense of a  
8     contingency -- of a large fee and a successful  
9     contingency case, but it doesn't -- it would be a nice  
10    world if you received 25 percent of \$9.4 million on  
11    each of your cases, but Your Honor understands that's  
12    not the world we live in.

13                THE COURT: Some cases don't turn out as  
14    well as this one --

15                MR. BENNETT: They don't at all, Judge.

16                THE COURT: All right. Anything else you  
17    want to tell me before I hear from the bank folks?

18                MR. BENNETT: Not unless there are other  
19    questions Your Honor has at this or future points.

20                THE COURT: Okay.

21                MR. AGOGLIA: Thank you again, Your Honor,  
22    for hearing us out. Michael Agoglia on behalf of Bank  
23    of America. I have with me here Grant Decker from  
24    Tyson's Corner who also has been representing the  
25    bank.



1 THE COURT: And you're from San Francisco,  
2 right?

3 MR. AGOGLIA: I am, sir. Not originally,  
4 but --

5 THE COURT: Nice to have you here and I hope  
6 you're feeling better.

7 MR. AGOGLIA: Thank you very much, and  
8 again, I greatly appreciate the courtesy shown by the  
9 Court and opposing counsel.

10 THE COURT: Why in the world should the  
11 Court preliminarily approve this on a class basis?

12 MR. AGOGLIA: Many of the questions you ask  
13 go to what I think are the perversities of the Fair  
14 Credit Reporting Act as it imposes the threat of  
15 liability in the billions of dollars as you were  
16 calculating it in your head, and some of them are  
17 specific to this case, but I've been doing this work  
18 for coming on now 20 years. I've settled a number of  
19 FCRA class actions. I was involved in litigation that  
20 brought -- this Murray v. GMAC case that counsel  
21 talked about, and I do think this is an abundantly  
22 fair settlement from the standpoint --

23 THE COURT: Bank of America thinks this  
24 settlement is abundantly fair?

25 MR. AGOGLIA: Well, Bank of America would

1 prefer that the dollar figure be zero.

2 THE COURT: Sure.

3 MR. AGOGLIA: Bank of America had --

4 THE COURT: They wouldn't settle for zero.

5 MR. AGOGLIA: -- an extraordinarily  
6 difficult time in a case where millions of dollars  
7 were spent when FACTA was passed apprehending how you  
8 comply with this specific provision, you know, that --  
9 this six sigma practice, which is --

10 THE COURT: Can they prove willful  
11 violation?

12 MR. AGOGLIA: We don't think so. I think --

13 THE COURT: Then why are you settling this  
14 case?

15 MR. AGOGLIA: Well, because from the bank's  
16 perspective, even if you consider it a slam dunk --  
17 and I don't know how you would handicap a slam dunk.

18 THE COURT: There are no slam dunks.

19 MR. AGOGLIA: But say it's 90 percent  
20 certain that we'll defend this to a defense judgment,  
21 which, really, all you would have to do, as you  
22 identified, with the willfulness claim, that 10  
23 percent risk of loss is several multiples of this  
24 settlement. So from the bank's perspective, Your  
25 Honor --

1           THE COURT: From the statutory damages  
2 standpoint?

3           MR. AGOGLIA: Right. The perversity of this  
4 per transaction damage provision makes this an  
5 economically rational settlement. It sticks in their  
6 craw, they have to ask the institution --

7           THE COURT: It sticks in their craw because  
8 they spent millions to try to get it right.

9           MR. AGOGLIA: Right.

10          THE COURT: And they have lawyers telling  
11 them that they got it right.

12          MR. AGOGLIA: Right, several, and several  
13 leading FCRA lawyers, and they designed a system which  
14 they think was better than the lowest common  
15 denominator compliance approach that they've now gone  
16 through really to make sure that they don't get sued  
17 again and again in the future and that others went to,  
18 and I'd like to talk to that, because as you  
19 identified, there is this question of how soon is soon  
20 enough?

21          THE COURT: Three days versus seven -- the  
22 seven days.

23          MR. AGOGLIA: Right.

24          And let me take the ACAPS platform, which is  
25 the home equity loans and home equity lines of credit

1 platform that Mr. Domonoske's transaction was  
2 originated on. At the time Mr. Domonoske's  
3 transaction took place, the average time between the  
4 submission of an application and the decision, we'll  
5 make it at -- we'll extend that line of credit, we'll  
6 make it a home equity loan, you've withdrawn it,  
7 you've turned it down, all the things that trigger the  
8 sending of this notice, the average time was three  
9 days. Over the life of the class period, the average  
10 time was eight days. And it's true that indeed the  
11 protocol was for loans that closed that we approved  
12 and agreed to fund, that the notice was necessarily  
13 triggered after the closing.

14 THE COURT: And I think in Mr. Domonoske's  
15 case, it was more --

16 MR. AGOGLIA: Mr. Domonoske's transaction  
17 was elongated.

18 THE COURT: It was a longer period of time.

19 MR. AGOGLIA: And he fell into the less than  
20 one percent category where his mailings -- in the mail  
21 processing center, his piece was rejected by this, you  
22 know, sort of futuristic device that reads a million  
23 pieces of mail a day and the barcode came up with an  
24 error, so his got kicked out and another four or five  
25 days of delay in its delivery. There was testimony

1 about that. But that's right, the --

2 THE COURT: Was it kicked out internally or  
3 by the postal service?

4 MR. AGOGLIA: By the bank's internal mail  
5 processing center, the facility --

6 THE COURT: But that was only by four or  
7 five days, you think?

8 MR. AGOGLIA: Right. Just that it was  
9 anomalous in terms of how much time it took to get him  
10 the disclosure after the --

11 THE COURT: I thought it was more than 30  
12 days for Mr. Domonoske -- in Mr. Domonoske's case.

13 MR. AGOGLIA: From the time of his  
14 application to the time of the close was a period of,  
15 I think, 45 days, and during that period,  
16 Mr. Domonoske was at times unhappy with the appraisal  
17 that came in on it, there was a negotiation about  
18 terms. It was extended and elongated for a number of  
19 reasons. It was clearly statistically an outlier in  
20 terms of how long it took to close. Again, the entire  
21 class period for that ACAPS platform was eight days  
22 between application and a decision triggering the --

23 THE COURT: Did Mr. Domonoske's loan close  
24 or was --

25 MR. AGOGLIA: Yes, yes. And let me speak to

1     that issue.

2                   THE COURT:   What kind of damages does he  
3     have?

4                   MR. AGOGLIA:   He doesn't have any actual  
5     damages, and --

6                   THE COURT:   Okay.

7                   MR. AGOGLIA:   That's our position.   In fact,  
8     Mr. Domonoske got his credit score the day after he  
9     applied.   He went out and bought it himself.   And  
10    Mr. Bennett alluded to the difficulties of proving  
11    causation, but clearly, even under plaintiff's  
12    conception, the next day was not when the disclosure  
13    should have arrived, so he got that on his own.   He  
14    had it, he got a later verbal disclosure of the actual  
15    credit score from the bank making his proof of actual  
16    injury even harder, and the proof of actual injury is  
17    going to be difficult here.

18                   THE COURT:   Oh, I would think so.

19                   MR. AGOGLIA:   But you could envision cases  
20    where someone would say, under either platform, Look,  
21    this took awhile.   I was generally interested in  
22    finding it out.   I had a dentist who said I owed him  
23    money and I really didn't, that lowered my credit  
24    score and that increased my --

25                   THE COURT:   Might have.   And it may have

1 affected the terms of the loan.

2 MR. AGOGLIA: Right.

3 THE COURT: Exactly.

4 MR. AGOGLIA: Now -- and they would have to  
5 say -- and so a person could come into court and say,  
6 Look, I actually wanted to know, I would have followed  
7 up, and if I had followed up, I might have lowered my  
8 score within the time period that transaction was  
9 pending and I might have gotten a better deal from the  
10 bank.

11 THE COURT: I mean, is that, in fact, the  
12 public policy rationale behind the statute?

13 MR. AGOGLIA: You know, I would say no. The  
14 FCRA provides a number of different opportunities when  
15 creditors or insurance companies using credit reports  
16 have to go ahead and tell consumers that it's being  
17 done so the consumers can follow up and take advantage  
18 of the other remedies available to check your credit  
19 report to see that it's accurate, but in many  
20 different instances, the FCRA says --

21 THE COURT: Like those guys in the pirate  
22 costumes who play on the TV commercials.

23 MR. AGOGLIA: Right, the jingle that sticks  
24 in your mind.

25 THE COURT: Right, right.

1           MR. AGOGLIA: And so there is no, for  
2 instance, obligation for the bank to reprice your loan  
3 if you get an early credit score disclosure, it turns  
4 out to be wrong and you get it lowered. It doesn't  
5 impose upon the creditor the obligation to reprice it.

6           THE COURT: It doesn't micromanage that  
7 crediting -- that under -- not underwriting, that --  
8 the lending decision.

9           MR. AGOGLIA: Right.

10           But as a policy matter, I'm not sure --  
11 there is really no legislative guidance on this  
12 specific provision, 1681g(g), guiding what they meant  
13 by as soon as reasonably practicable or the terms use,  
14 which is also important in a liability analysis. But  
15 there is certainly a policy argument on the other side  
16 that says the earlier they get it in the process, the  
17 more valuable it will be for the consumer, and maybe  
18 the consumer can affect by negotiation a change in the  
19 outcome of the underlying transaction.

20           But what is also clear is that the bank had  
21 no financial incentive. It didn't reap any monetary  
22 benefit by this delay. So why did it do it? It  
23 delayed for a couple of what I think are  
24 demonstratively reasonable and practicable reasons.  
25 One, it often takes time, several days, to do the



1 internal housekeeping once an application comes in to  
2 make sure you have the right person, that you clear up  
3 these fraud alerts that are increasingly prevalent,  
4 then you look at whether or not there is an actual  
5 credit score that's been pulled. Sometimes they get  
6 inaccurate social securities, somebody may have  
7 transposed a digit. Those sorts of housekeeping  
8 matters take a minimum of a couple of days to sort  
9 out, and if they -- they decided -- and they tested  
10 this. If you waited a little bit longer, you would  
11 actually have a greater pool of individuals who would  
12 get their credit report sooner rather than sending the  
13 earliest possible notice out, excluding those for whom  
14 you did have a credit store and picking them up later  
15 in time. There is also a common practice in the home  
16 lending field to pull multiple credit scores during  
17 the life of the processing of the loan application,  
18 and the bank would have come in and testified that the  
19 one they actually use in any meaningful sense is the  
20 last one pulled. And so if your object is to get to  
21 the consumer the score that's actually having an  
22 impact in that transaction, waiting helps you. And  
23 then there are some, again, housekeeping issues about  
24 getting a proper mailing address. You know, people  
25 are applying for a new home, they have a current

1 address, they have the property address for the new  
2 home, where they may be residing for a period of time  
3 may be uncertain, and so some additional time, they  
4 found, materially helped them mail accurately to the  
5 right address.

6           What does this mean? It means that I think  
7 we have a very strong defense on even a negligence  
8 violation claim. This is a statute where there is no  
9 authority outside of the language itself as to what as  
10 soon as reasonable practicable after use means. I  
11 would submit that it is --

12           THE COURT: I know. I looked.

13           MR. AGOGLIA: You know, you're not going to  
14 find it. There was a 2000 statute passed in  
15 California providing the same disclosure that this  
16 borrowed from, but the only roughly analogous language  
17 was in the old Rule 23, as soon as practicable was a  
18 time period for district court judges to hear class  
19 certain motions, and that language is no longer there,  
20 in part because the variation in how that was  
21 interpreted and applied across the country was  
22 incredible. That was a year and-a-half for some  
23 courts, it was three days in the Eastern District of  
24 Virginia. You know, it is, in fact, a very case by  
25 case, transaction specific standard, and to add the

1 additional qualifier, reasonably practicable, we  
2 think, allowed them -- and their counsel at the time  
3 thought -- allowed them to take into account mailing  
4 addresses, multiple credit score pulls on that -- and  
5 that --

6 THE COURT: And doing it involved doing it  
7 all at one time?

8 MR. AGOGLIA: Right.

9 And they understand that you have to design  
10 it based upon the origination systems because you're  
11 talking hundreds of thousands of pieces a week. It's  
12 got to be automated, there has to be a system to do it  
13 and you have to send it to these outside vendors.

14 So what's the alternative formulation? The  
15 alternative formulation -- and Mr. Bennett alluded to  
16 it -- is this three-days-from-application standard.  
17 The problem with that -- in that, that standard was  
18 well-known to Congress at the time it passed back --  
19 indeed, the Truth in Lending Act and the FCRA are both  
20 under the same Consumer Credit Protection Act. They  
21 both are under the same umbrella statute. And, you  
22 know, I think of all the places you could make this  
23 argument, it is most powerful here, that if Congress  
24 wanted to set a clear temporal time period within  
25 which this disclosure had to be provided, if it wanted

1 to be three days after application, it would have said  
2 so. It had done so in TELA for years, it had done so  
3 in RESPA for years. So that is essentially within a  
4 day where we have gone in the current system, the one  
5 that's subject to the injunction, and I'll get that to  
6 you, but I think counsel is here to represent in  
7 connection with the junction, we are here to tell you  
8 that the system that they have gone to, the one that  
9 we're going to ask you to -- or Judge Wilson to  
10 approve and enter an order finally approving the  
11 hearing -- the settlement on this injunction is,  
12 without any reasonable question, compliant with this  
13 standard under the Fair Credit Reporting Act.

14 Let me mention a thing or two about the  
15 counts here. You've raised a couple of questions  
16 about that. It is true that there are, as we  
17 estimate, approximately 3.5 potential class members  
18 here, but there are 2.2 million transactions that were  
19 affected, and the reason for the variance is that you  
20 have co-applicants.

21 THE COURT: The hypothetical that I posed,  
22 perhaps.

23 MR. AGOGLIA: Right.

24 And we think --

25 THE COURT: Oh, and co-applicants.

1 MR. AGOGLIA: Right.

2 And because it's home lending,  
3 overwhelmingly, these are spouses or direct relatives.  
4 Who do you put on your deed or mortgage?

5 THE COURT: Oh, I see. So it's -- the  
6 numbers are different than I suggested.

7 MR. AGOGLIA: So 2.2 is the number of  
8 transactions, and we think there is an argument, it's  
9 an unsettled question under this provision whether or  
10 not liability should be per transaction or per  
11 individual.

12 THE COURT: Sounds like there is a lot of  
13 stuff unsettled under this provision.

14 MR. AGOGLIA: You know, the problem with the  
15 FCRA in part is they gave the power to interpret the  
16 statute to four separate agencies, and they didn't  
17 include the FDC in that, because the FDC wasn't  
18 trusted to make a ruling. So there is no body of  
19 regulation like you have under RESPA or Truth in  
20 Lending to fill in the gaps here, and there is no  
21 district court opinion, there is certainly no circuit  
22 court opinion, there is no formal agency guidance  
23 interpreting what the heck this means. So we think  
24 you could look at this from a fairness perspective  
25 understanding that it could be 2. -- we could have

1 stuck at 2.2 million and divvied up the class benefits  
2 that way. We are allowing per individual, per loan  
3 recovery, and it's simplified. It's simplified in  
4 that if you are a class member and you have five  
5 transactions with Bank of America, A, you'll get a PIN  
6 number with your mail-in which will allow you to go  
7 online and see exactly how many qualifying  
8 transactions you have, and if you submit a claim form  
9 either in mail or online, we'll automatically pay you  
10 for each of the qualifying transactions. So it would  
11 be, if there were five qualifying transactions and the  
12 redemption for claims rates were low enough, it could  
13 be \$500 per an individual class member in terms of  
14 their take. The Legacy Bank of America class is by  
15 definition all closed loans of that 2.2 million  
16 transaction count. By memory, I think it was just  
17 around 980,000 transactions. And so, as Mr. Bennett  
18 said, it's not quite 50/50 but closer to 60/40 in  
19 terms of the split between the ACAPS and the Legacy  
20 Bank of America channels that feed into this class.  
21 Because of the way the statute is written, it is our  
22 position that a negligence violation class would be  
23 uncertifiable, unless the Court were to accept this  
24 theory of an imputed economic value on a class-wide  
25 basis for a delay in receiving your credit score

1 disclosure. Other courts have rejected those  
2 approaches. It's subject to the quick rebuttal, But  
3 what if they did get it, you know, that is something  
4 there, and we don't impute actual damages, you know,  
5 in Federal Court, we generally require proof of them,  
6 so we turn to the willfulness claim.

7 THE COURT: Why do you think that's  
8 certifiable as opposed to the negligence claim?

9 MR. AGOGLIA: Well, you know, if litigated,  
10 our position would be it wouldn't be certifiable. And  
11 while the Supreme Court instructs in (inaudible) that  
12 you can't ignore the standards of Rule 23 simply  
13 because it's served up for the Court in the context of  
14 a settlement, it did also recognize, however, that  
15 things like manageability and superiority can be  
16 fundamentally altered because the process of resolving  
17 claims and managing the distribution of benefit has  
18 been accounted for in an orderly fashion in the terms  
19 of the settlement agreement. I certainly think that's  
20 the case here, that there is a very clear streamline,  
21 straightforward, relatively easy to manage process  
22 that we have agreed to to resolve the claims here.

23 THE COURT: But that begs the question of  
24 whether or not it's subject to class certification to  
25 start with. I mean, why -- tell me why you think a

1 negligent claim is not certifiable but a willful claim  
2 is. Is it just because of the statutory damages?

3 MR. AGOGLIA: No. I mean, I -- I would --  
4 again, I would say that I think neither -- I mean, we  
5 would argue -- we were prepared to argue to this Court  
6 when it was referred to you that neither claim is  
7 certifiable here, and that's in part because the  
8 Constitutional arguments on the willful violation side  
9 are not just the, it's just too much, what's  
10 characterized in the Murray case as the annihilating  
11 damages scenario and the due process concerns right  
12 there. They're more specific. The 11th Circuit has  
13 heard and passed on a challenge which we would be  
14 prepared to raise in circumstances like this to the  
15 effect of, if you do not have an assessment of whether  
16 this class member suffered a penny's worth of actual  
17 damage, how can the Court be guided as to where  
18 between \$100 and \$1,000 it needs to exercise its  
19 Congressionally-delegated discretion to impose what  
20 is, from our reading, a punitive measure? Now, that  
21 hasn't been tested. But there have been courts that  
22 have said that the need to consider actual damages  
23 precludes us from really moving forward with the class  
24 in a litigated context on a willful claim. There are  
25 some courts, as Mr. Bennett referred to, that have



1     come out the other way under the FCRA on these issues  
2     and have said things like, Well, in that event, it  
3     would be impossible to certify any class under the  
4     Fair Credit Reporting Act. So there is a body of law  
5     which comes out differently on these issues, and it's  
6     in that realm that we went forward and settled the  
7     class on these terms.

8             THE COURT: What possible -- from your  
9     perspective, what possible rationalization is there to  
10    certify a willful class in this case?

11            MR. AGOGLIA: Well --

12            THE COURT: Because you're telling me it's  
13    not certifiable.

14            MR. AGOGLIA: Well, if litigated, I would  
15    tell you we would strenuously object to certification  
16    of it, but I would also have to concede that the  
17    outcome of that argument isn't preordained, and  
18    because there is a fair debate about that question,  
19    Your Honor, that justifies the Court proceeding with  
20    the nationwide settlement as we have proposed, and I  
21    think this settlement is especially principled in the  
22    way in which it distributes the benefit. It is a  
23    claims process. It does ask folks very simply to say,  
24    Were you interested in finding your credit score  
25    during the transaction? And in that -- it also

1 doesn't require that as the only basis upon which you  
2 can submit a proper claim form, and we did that in  
3 negotiation with plaintiff's counsel so that there  
4 would be no claim that we were trying to drive down  
5 redemption rates. But that provision of the claims  
6 process, to my way of thinking about the statute,  
7 marries up with what is the legitimate basis upon  
8 which any class member should recover here, and that's  
9 a colorable claim of actual injury. If they can say,  
10 at least, I was interested in finding out about it and  
11 I didn't get it quickly enough, then they have a  
12 colorable claim of actual injury and have an  
13 entitlement to participate in the benefits of the  
14 class, which are -- which is principled and different  
15 than the rest of the class members who may say, I  
16 don't want to bother, I really didn't care about it.  
17 I would agree with Mr. Bennett, they all do, from  
18 plaintiff's perspective, come at it from a common  
19 claim, a common theory of liability, and what  
20 distinguishes them is, in my mind, whether they have a  
21 colorable claim of actual injury, and that's a  
22 principle basis upon which the Court can approve a  
23 settlement that will ultimately distinguish between  
24 who gets it and who doesn't, based upon the class  
25 member's own action.

1           THE COURT: You're saying based on the  
2 notice -- look at the notice, they filed their notice,  
3 that demonstrates their colorable claim of actual  
4 damages?

5           MR. AGOGLIA: The claim form, Your Honor,  
6 requires them to say the following: By submitting  
7 this claim, you are certifying that you are either  
8 unaware of the fact that you have rendered -- you are  
9 unaware of any fact that would render you ineligible  
10 to participate in the settlement or that you were  
11 interested in obtaining your credit score during the  
12 Bank of America transaction. And it's the second of  
13 those two clauses that I was alluding to. The first  
14 is an independent basis upon which people can simply  
15 participate and submit a claim so that we're not  
16 facing the accusation that sometimes objectors make  
17 that the claims process presents an unfair hurdle, an  
18 unfair obstacle for class members to go ahead and  
19 submit a claim and participate in the class, but there  
20 is a principled -- you accurately defined the  
21 consequence of the claims process in that some get  
22 maybe 100 bucks and some get nothing if they don't  
23 submit a claim form. And my point is simply, I think  
24 not only is that right, that is abundantly fair under  
25 the terms of this statute where we would otherwise

1 have a much more significant defense as to those  
2 individuals on both the negligent claim, which they  
3 only recover actual damages for, and on a willful  
4 claim when we would say, there is no ratio starting  
5 from zero that is Constitutionally permissible to  
6 impose any dollar of statutory damages.

7 So those are -- I apologize -- my less than  
8 organized thoughts in response to some of the  
9 questions you had raised.

10 THE COURT: Do you have any problem with  
11 either Mr. Rivera or Mr. Domonoske as class  
12 representative?

13 MR. AGOGLIA: I do not. I mean, for  
14 purposes of settlement?

15 THE COURT: Yes.

16 MR. AGOGLIA: As always qualified?

17 THE COURT: Yes.

18 MR. AGOGLIA: I do not. The classes are  
19 designed so that they are both included in the Legacy  
20 B of A platform class and the --

21 THE COURT: Did you depose Rivera?

22 MR. AGOGLIA: We did not depose Rivera.  
23 We've got successive affidavits from Mr. Rivera.

24 THE COURT: And does he seem -- does he  
25 appear to be somebody who is knowledgeable about this

1 issue?

2 MR. AGOGLIA: From the standpoint of defense  
3 counsel, it does appear that he actively participated  
4 with counsel on --

5 THE COURT: All right. Perhaps that's a  
6 better question.

7 How about Mr. Domonoske? From his  
8 standpoint, does he appear to be someone who is  
9 actively participating in terms of what he believes to  
10 be a violation of the statute?

11 MR. AGOGLIA: From the day after he applied  
12 for his loan with Bank of America, as revealed in  
13 copious handwritten notes, and thereafter,  
14 Mr. Domonoske has set a new standard for involvement.

15 THE COURT: Well, I mean, it sounds like to  
16 me from what Mr. Bennett says is that he -- he's done  
17 all the right things. He's paid his -- the cost and  
18 expenses upfront, he's -- you know, he's going to, if  
19 the settlement is approved, get his share of the class  
20 and plus a relatively minor stipend given the dollars  
21 that are involved here, so it sounds to me like  
22 Mr. Domonoske has acted appropriately and Mr. Rivera,  
23 as well. I just was -- from your perspective if there  
24 was anything that you wanted to share with me on that  
25 score?

1 MR. AGOGLIA: No, Your Honor. We have  
2 signed the settlement agreement agreeing that they can  
3 fairly and adequately --

4 THE COURT: One other question.

5 MR. AGOGLIA: Yes, Your Honor.

6 THE COURT: What is this outfit that is  
7 getting the bulk of the money if there is not enough  
8 claims to submit, you know, because there is \$100 max  
9 and the attorneys' fees are capped, and if there is  
10 something left over, it goes to some group. What  
11 is -- I'm not familiar with that, and I -- can you  
12 tell me about that?

13 MR. AGOGLIA: Mr. Bennett, I think --

14 THE COURT: And I just forgot to ask him,  
15 but if you don't have any information, I will ask him.

16 MR. AGOGLIA: I have a couple more comments,  
17 if you could leave it on notice, that I just want to  
18 put on the record, but --

19 THE COURT: No, no, I want to hear whatever  
20 you have to say, and I apologize if my questions have  
21 sent you askew.

22 MR. AGOGLIA: Not at all.

23 MR. BENNETT: Judge, the Center for  
24 Responsible Lending is a --

25 THE COURT: That's what it is.

1           MR. BENNETT: Yes, sir. It's a mainstream  
2 organization in that it's one of the strongest  
3 national nonprofit for consumer lending rights. It's  
4 one that --

5           THE COURT: All right. Let me ask you this  
6 question, just because -- is there any association  
7 between either the lawyers or the class  
8 representatives in this case with this either in  
9 ownership or --

10          MR. BENNETT: We're not on the board, we're  
11 not --

12          THE COURT: -- on the board, any kind of  
13 role in the Center for Responsible Lending?

14          MR. BENNETT: No, sir.

15          THE COURT: I mean, I think it's incumbent  
16 on me to just ask the question.

17          MR. BENNETT: Absolutely.

18          No, sir, and if I could provide Your Honor  
19 the explanation of the attraction to the Center for --

20          THE COURT: Yes, sir, yeah, I don't know  
21 anything about them.

22          MR. BENNETT: They have a more -- they have  
23 a foreclosure mitigation project that provides  
24 emergency help, financial counseling help to  
25 foreclosure individuals. We -- and it's actually

1    been -- so this organization -- I mean, I'm a top --  
2    you know, head-to-toe consumer advocate, so it's a --  
3    definitely, it's a consumer advocacy group. It's also  
4    an organization that a lot of mainstream, reputable  
5    lenders, including Bank of America, have supported in  
6    the -- its various roles and causes. It's one of the  
7    strongest advocacy organizations nationally. In fact,  
8    what I could --

9               THE COURT: Supported by both borrowers and  
10   lenders?

11              MR. BENNETT: Yes, sir, although, I suspect  
12   that -- yes, sir, it is. It's supported by consumer  
13   advocates, and amongst --

14              THE COURT: So you're saying it's got this  
15   program now to help folks out with counseling if  
16   they're one of those folks who is struggling now with  
17   being foreclosed on?

18              MR. BENNETT: Yes, sir.

19              We've actually -- Mr. (Inaudible) had flown  
20   to Washington and met with the director and the other  
21   individuals who are working within this program and  
22   project. We have shared information and details and  
23   discussions with Mr. Agoglia in his representation of  
24   defendant. It wasn't simply, we like these guys, we  
25   picked them out. The objective for the (inaudible) --



1 and I think it's more likely that the (inaudible)  
2 would be limited -- the money that they would likely  
3 receive will be un-cashed or unclaimed checks, which  
4 even when we distribute in class actions to  
5 individuals that claim, some individuals just don't  
6 exercise (inaudible), but we had thousand dollars  
7 checks.

8 THE COURT: I mean, wouldn't it be your  
9 experience that most of the 7 million bucks is going  
10 to go to the class members?

11 MR. BENNETT: Absolutely, yes, sir. I think  
12 almost all of it will.

13 THE COURT: Simply because there are so  
14 many?

15 MR. BENNETT: There are so many, and the up  
16 to \$100 is pretty significant.

17 THE COURT: I mean, the up to \$100 takes you  
18 way over the \$7 million.

19 MR. BENNETT: Yes, sir.

20 THE COURT: It just does.

21 MR. BENNETT: It does, Your Honor.

22 THE COURT: So you think there might be very  
23 little that actually goes to the Center for  
24 Responsible Lending? I think what you said, maybe  
25 unclaimed checks.

1 MR. BENNETT: Yes, Your Honor.

2 THE COURT: All right. Any other --

3 Mr. Bennett, thank you.

4 Any other things that you want to tell me,  
5 or perhaps your colleague, Mr. Erausquin, if  
6 Mr. Bennett has gotten things wrong, anything that you  
7 want to share with the Court to -- as I'm trying to --  
8 and I understand my role in this. I understand we're  
9 looking at preliminary approval, but I just thought,  
10 we've come up here -- Mr. Agoglia has traveled all the  
11 way across the country, we at least ought to get some  
12 of these questions on the table. Anything else you  
13 want -- anything else you guys want to say on the  
14 plaintiff's side?

15 MR. ERAUSQUIN: I'd just remind Mr. Bennett  
16 that Mr. Domonoske did pay his \$6 for his score.

17 THE COURT: Oh, so he did actually pay \$6?

18 MR. ERAUSQUIN: Yes, sir.

19 THE COURT: Okay. All right.

20 MR. BENNETT: Yeah, Judge, given the --

21 THE COURT: I mean, it sounds like  
22 Mr. Domonoske is, from my limited experience with  
23 class representatives, the most active class  
24 representative I've ever heard of and probably a good  
25 client to have.

1 MR. BENNETT: Judge, it's not that great  
2 sometimes when your client is smarter than you,  
3 either, and as I learned --

4 THE COURT: That was always the case when I  
5 was practicing.

6 MR. BENNETT: But he is. He's done -- you  
7 know, this -- I'm editorializing. I met him as a  
8 consumer advocate. I didn't know him personally. But  
9 he has done a lot for consumers independent of this  
10 role, and I was impressed that he lived by the same  
11 mantra he was imposing on his class reps in working  
12 other cases, so he -- in terms of paying the costs and  
13 that kind of thing.

14 THE COURT: Pretty unusual in my experience.

15 MR. BENNETT: Incredibly unusual, if unusual  
16 means the only time ever I've ever had that happen.  
17 And certainly I would encourage that, you know, but  
18 it's not a reality with the expenses of litigation as  
19 they are? And including in this instance -- I mean,  
20 Mr. Domonoske, at our request for one of the  
21 mediations -- the initial mediation took place in San  
22 Francisco. Unsuccessful in hindsight. We should  
23 probably stick with Virginia judges, but we made a  
24 couple trips to San Francisco. Mr. Domonoske was the  
25 first one out there, paid his own way and flew out

1    there for the mediation, and this was -- and in terms  
2    of cost as well, I think -- how much did we pay? I  
3    think collectively, both the defendant and the  
4    plaintiff, together we paid about \$8,000 a day for the  
5    mediation with a retired federal magistrate.

6           THE COURT: I do it for free.

7           MR. BENNETT: I told Judge Donell --

8           THE COURT: He's a good judge.

9           MR. BENNETT: He needs to put -- for 350  
10   bucks, we get a heck of a lot in magistrate  
11   mediations, but the one thing I could, if you give me  
12   the opportunity with your catchall, anything else that  
13   I could add, and if I could couch this initially, I  
14   don't want to appear defensive because I'm not  
15   defensive about the attorneys' fee issue, but what I  
16   would like, if -- ideally, I could convince Your Honor  
17   to the following to things: First, I would be  
18   concerned about submitting just -- if we were going to  
19   submit this preliminary question of the magnitude of  
20   the attorneys' fees question, Your Honor, I'd like to  
21   submit it fully to Your Honor, because I don't just  
22   simply want to say, Here's our time. I would like to  
23   be able to say, Judge, here is why this is a  
24   reasonable fee. And what I would ask, Judge, is that  
25   we do that, and maybe if we have an additional -- if I

1 could have until the 17th? Actually, we have two days  
2 of mediations the week of -- or on December 8th and  
3 9th before Judge Donell in Richmond and a packet of  
4 130 individual cases that we're trying to mediate,  
5 LexisNexis, but -- so that if I could provide that or  
6 we could provide the formal background, but if the  
7 Court decides that the settlement is fair, a decision  
8 that Your Honor has not necessarily reached yet, but  
9 the language of the attorneys' fee provision says that  
10 defense counsel agree to request approval of fee in an  
11 amount not to exceed \$25,000. It doesn't -- there is  
12 nothing in the agreement, there is nothing in the  
13 Court's order even as drafted that decides the fee  
14 question. In most --

15 THE COURT: Oh, I understand that. I  
16 understand that that would not decide the fee  
17 question, and at the end of the day, that's probably  
18 not my decision anyway. That's Judge Wilson's  
19 decision.

20 MR. BENNETT: Yes, sir, but it -- my  
21 suspicion is that if it's anything like the Eastern  
22 District our jugs respect our judges, so the  
23 question --

24 THE COURT: I get reversed all the time.  
25 Well, not all the time, but I do get reversed

1 occasionally.

2 MR. BENNETT: Well, Judge, it will be a good  
3 warmup, because I'm sure Judge Wilson will ask a  
4 question, If your clients are getting \$100 max and  
5 you're getting two -- you know, or \$500,000, well, my  
6 take would be, that's a lot of money, and when -- I'm  
7 used to defending it. We -- you know, the good news  
8 about growing up litigating in Virginia --

9 THE COURT: Take to the 17th.

10 MR. BENNETT: Take to the 17th.

11 But I would like, if possible, if the Court  
12 otherwise approves this, if you could add a provision  
13 that requires that from us, but I don't want to hold  
14 the settlement up because it's a lot of money  
15 interest-wise for the class, and the value and the  
16 addresses going stale and the like as far as timing.  
17 I'm happy to do whatever Your Honor wants. We can  
18 defend our fee and we will, but the --

19 THE COURT: Well, you're going to have to  
20 submit that anyway, so go ahead and do it and I'll  
21 work as hard on this as I possibly can.

22 MR. BENNETT: Yes, sir.

23 THE COURT: All right. Mr. Agoglia, I have  
24 two questions for you.

25 MR. AGOGLIA: Yes, sir.

1           THE COURT: First, from the standpoint of  
2 the defendant, Bank of America, with all the time,  
3 effort and trouble you've put into this, do you  
4 believe that under the provision of Rule 23 that the  
5 class as proposed is certifiable?

6           MR. AGOGLIA: I believe that it is, Your  
7 Honor. I would have to --

8           THE COURT: For the purposes of a settlement  
9 in this case.

10          MR. AGOGLIA: Right.

11           I would have to have made that decision  
12 consciously before signing and submitting the joinder,  
13 which we did, and for the purposes of settlement  
14 alone, knowing that you can look at manageability and  
15 superiority as important prongs of the 23 B3 class  
16 differently permissibly under the (inaudible)  
17 teaching, I do.

18          THE COURT: Second question: What do you  
19 think about the attorneys' fees?

20          MR. AGOGLIA: I believe that I am  
21 contractually rendered close to mute on the attorneys'  
22 fees. What we have agreed to is a fairly standard  
23 provision.

24          THE COURT: In other words, you're not --

25          MR. AGOGLIA: We're not going to object up

1 to what is 25 percent of that 9.4 or 23 percent of the  
2 9.9. That was the confusion, I think, earlier. And  
3 as with many things, that's (inaudible) that we have  
4 to commit to the Court's discretion.

5 THE COURT: Fair enough. I accept that.

6 Anything else you want to say?

7 MR. AGOGLIA: On the notice issue, because  
8 one of the most important things in the preliminary  
9 approval stage of a class settlement is getting  
10 approval of the specific notice regime, because that  
11 will have taken place in advance of the fairness  
12 hearing.

13 THE COURT: Yes, sir.

14 MR. AGOGLIA: The expenses involved here are  
15 enormous in terms of the cost to mail notice here, so  
16 I want to make sure we're very clear with the Court on  
17 what we're going to do. I do think, having settled  
18 many nationwide class actions, that it's the single  
19 finest protocol for developing accurate address lists  
20 and providing a meaningful notice to the class members  
21 that I have seen ever. It starts with the preparation  
22 of the class list. The class list is drawn from the  
23 underlying mortgage records. Mortgage records are  
24 inherently more reliable than, you know, sort of, cell  
25 phone account records or other consumer purchase



1 records. In the case of Bank of America, those  
2 records are scrubbed and updated routinely. There is  
3 the national change of address database that the U.S.  
4 Postal Service maintains to update addresses when  
5 people move. The bank for the ACAPS platform  
6 scrubs -- sends all of its addresses for its consumers  
7 on those home equity loans through the NCOA database  
8 on a daily basis. For the Legacy Bank of America  
9 system, it was every six months that they updated the  
10 addresses through the NCOA database; it's now every --  
11 it's been every three months that they do that for the  
12 last several months. If any mail is returned  
13 undeliverable when a statement of your mortgage or  
14 home equity line is sent, the bank immediately follows  
15 up with a telephone call to the individual to get  
16 updated address information, and they are robust about  
17 constantly updating those records. They have a real  
18 interest in getting their mortgage and home equity  
19 loan payments on a timely basis. So they start with a  
20 great degree of reliability, and then we've gone  
21 beyond that. For any loans that were paid off as of  
22 September 30, because we needed a date to administer,  
23 we will have the records updated by comparing them to  
24 our central customer repository, so if they were a  
25 home equity loan customer who paid off that home

1 equity loan in August but they have a checking  
2 account, if they have a car loan, if they have a  
3 credit card, if they have a student loan, that record  
4 will be updated accordingly. There is a significant  
5 cost associated with that process. And then we have  
6 provided that for anyone who paid off -- more than  
7 recently; more than six months ago, and for whom we do  
8 not have an updated record in our customer database  
9 elsewhere, we will submit all those records through  
10 LexisNexis, the sort of skiptracing platinum standard  
11 to get updated information. It's very expensive to do  
12 that. We anticipate it will cost well over \$100,000  
13 just to do that step of the process, and all of that  
14 together will form a class list that will be turned  
15 over -- the time period is 14 days after the entry by  
16 Judge Wilson of an order preliminarily approving the  
17 class settlement. That will be the most reliable set  
18 of mailing addresses I can imagine. We then will have  
19 Rust Consulting, who Mr. Bennett accurately described  
20 as the gold standard, I think he used, for settlement  
21 administrators, send the entire class list back  
22 through the National Change of Address database.  
23 There is a cost associated with that, as well. And  
24 then Rust will send out a mailer. And the mailer will  
25 contain the class notice, which we've attached to the

1 settlement agreement, the claim form, which we've  
2 attached to the settlement agreement, and the class  
3 notice contains an opt-out form.

4 I'd like, if I could, approach and hand Your  
5 Honor two sample mailers so that you have in your hand  
6 what it is we intend to send.

7 THE COURT: All right. Do you want to mark  
8 those as exhibits?

9 MR. BENNETT: Sure, yes, we would -- we join  
10 in them, yes. We have seen exactly the same thing --  
11 or have exactly the same thing.

12 THE COURT: All right. Let's go ahead and  
13 we'll mark them as Bank of America Exhibit 1.

14 MR. AGOGLIA: If we could, maybe we could  
15 mark them 1 and 2, Your Honor. I'm going to  
16 separately refer to them. There are two of them.

17 THE COURT: There are two of them?

18 All right. Yeah, mark them as 1 and 2,  
19 then.

20

21 (Plaintiff's Exhibits Nos. 1 and 2 were  
22 received into evidence.)

23

24 MR. AGOGLIA: So Your Honor, what has been  
25 marked as Bank of America Exhibit 1 is an actual

1 mockup by Rust of the class notice opt-out form and  
2 claim form that we intend to use in Domonoske, with  
3 one resurrection. The text is identical; the  
4 formatting will be different.

5 I submit to you the Bank of America Exhibit  
6 Number 2 so that you can see the actual mailer that  
7 will go out will be somewhat differently. Most  
8 particularly, its fonts will be substantially larger  
9 and easier to read. The reason for the difference,  
10 Your Honor, is just that it costs a great deal of  
11 money to have it finally formatted and sent to the  
12 printer, which is a final step the settlement  
13 administrator will do once the notice -- formal notice  
14 is approved, but I wanted to have in front of you that  
15 mailer. As you can see, it's multipage. I think --  
16 and Mr. Bennett can speak to this -- that the content  
17 of our class note -- it's not only -- faithfully  
18 discharges what are our obligations and the Court's  
19 obligations under Rule 23 to inform class members  
20 about the nature of the case, their rights to opt out,  
21 their rights to object, the deadlines for doing so,  
22 but it does so in a very user-friendly format, if  
23 there can be something described as user-friendly  
24 about a legal notice.

25 The class members will also have access to a

1 Web site dedicated to the settlement on which all of  
2 the claim forms, class notices, will reside. The  
3 complaint, important orders of the Court will be  
4 posted there. The class members can download claim  
5 forms and they can, online, submit a request to opt  
6 out. They can online submit a claim form and they can  
7 online, through their unique PIN number provided with  
8 the mailer, see just how many qualifying transactions  
9 they have within this class period.

10 Again, I think that now is the platinum  
11 standard. It used to be, 15, 20 years ago, you know,  
12 there would be some publication in USA Today that  
13 would be good business for USA Today and, frankly,  
14 have a utility for professional objectors who trolled  
15 for those notices but almost no utility for class  
16 members. We think this is a much better, much better  
17 system. There will also be a toll free number that  
18 class members can call that will have information.

19 THE COURT: Does that go straight to  
20 Mr. Bennett's desk?

21 MR. BENNETT: It doesn't, but I can promise  
22 you that I will be happy to copy Bank of America's  
23 counsel on all the many contacts we did get.

24 MR. AGOGLIA: As long as he's willing to  
25 make me a co-payee on that check at the end of the

1 day, I'm happy to be included on that list.

2 The class members will be able to update  
3 their mailing address information on that, the toll  
4 free number, they'll be able to ask for a copy of the  
5 claim form or opt-out notice to be sent to them.  
6 Again, I think it's belt and suspenders in terms of  
7 best notice under the circumstances, which is the both  
8 Rule 23 and due process standard we operate under  
9 here.

10 So one of the things we asked for in the  
11 proposed preliminary approval order, which is Exhibit  
12 A to the settlement agreement, is for the Court to  
13 find that that is consistent with the obligations  
14 under Rule 23. The details that I've described to  
15 you, I think, are clearly spelled out in the terms of  
16 the settlement agreement itself, and again, I do think  
17 it is really the state of the art in terms of class  
18 notice. We -- the one thing I will alert the Court to  
19 is we're sending it out through standard rate, that  
20 mailer -- that type of -- goes out bulk rate, standard  
21 rate. The only difference between that and what  
22 people commonly refer to as first class is, while the  
23 post office goes ahead and forwards any forwarding  
24 address that they have, they don't get undeliverables  
25 back. You don't get undeliverables back. What we

1 have done, however, is do everything you would do if  
2 you got undeliverables on the front end in how we've  
3 prepared the class list, including taking those for  
4 whom we don't have a current updated address and  
5 running them through the skiptracing database of  
6 LexisNexis all in advance. So again, I -- I would  
7 submit that this is -- saves you a bunch of money on  
8 the mailing. The standard rate --

9 THE COURT: Bulk rate versus the standard  
10 rate?

11 MR. AGOGLIA: Right.

12 Standard rate will save hundreds of  
13 thousands of dollars, perhaps, on the mailing, but  
14 what you get, frankly, is a form of mailer -- I don't  
15 know if it's properly called a sixfold anymore, but  
16 this form of mailer is far better than an envelope --  
17 you know, it's -- you know, there are experts in the  
18 country who are involved in mail processing who will  
19 tell you that people are -- on an order of  
20 magnitude -- more likely to open that mailer than they  
21 are an envelope, say -- a legal notice that they have  
22 that pulls out, one-by-14 -- or eight-and-a-half-by-14  
23 notice out of an (inaudible) -- so I wanted to speak  
24 to notice directly. With that, Judge, I think I have  
25 exhausted your patience and all I needed to --

1           THE COURT: By no means. What was Exhibit  
2 2? Is that from another --

3           MR. AGOGLIA: I'm sorry, I should have told  
4 you. Yes, Rust has provided that to us as an example,  
5 one from another class settlement of what the font  
6 size -- and there won't be staples. As you can see in  
7 Exhibit 2 as opposed to Exhibit 1, there is a  
8 peel-back, you know, closure at the top.

9           THE COURT: I understand. That is from  
10 another settlement and it's just an example of what  
11 the finished product is going to look like with the  
12 font.

13          MR. AGOGLIA: Our ambition here is to obtain  
14 an order from, I believe, Judge Wilson, also --

15          THE COURT REPORTER: Excuse me. I'm sorry.  
16 I'm having some technical difficulties. Can we go off  
17 the record for a minute?

18          THE COURT: All right.

19

20               (Off the record.)

21

22          THE COURT: All right. We're back on the  
23 record.

24          MR. AGOGLIA: So Your Honor, I'll start --  
25 if you'll let me, I'll just quickly outline what I



1 think the operative deadlines should be. I've  
2 reviewed these in advance with Mr. Bennett and I think  
3 we are in agreement in terms of these timeframes.

4 The fairness hearing should be set 120 days  
5 after entry of the preliminary approval order, and  
6 that is in substantial part because this administrator  
7 will have 30 days to send the mailing out after  
8 preliminary approval. We would then ask that the  
9 deadline for class members to opt out be set 40 days  
10 in advance of that fairness hearing, that filing of  
11 objections and accompanying briefs to the settlement  
12 occur 30 days in advance of the fairness hearing, that  
13 any responses by the parties to objectors be filed at  
14 least 14 days in advance of the fairness hearing. And  
15 we have discussed, this may be altered somewhat in  
16 light of today's proceeding, but that the formal  
17 motion for final approval of fees, costs and the  
18 (inaudible) incentive award be submitted at least 14  
19 days in advance of the fairness hearing.

20 THE COURT: Okay. Let's just go through --  
21 and what I'm looking at, Exhibit A, you've given me  
22 these numbers.

23 MR. AGOGLIA: And I can -- if I can walk you  
24 through where I think they should go.

25 THE COURT: Yes, sir.

1           MR. AGOGLIA: On page one of the proposed  
2 preliminary approval order, Exhibit A, the settlement  
3 agreement, the opening paragraph, (inaudible) is  
4 simply left blank. September 30, 2009 in that opening  
5 paragraph space, that's when the agreement was  
6 executed. The next date is on page three, paragraph  
7 eight, that a proposed -- proposed preliminary  
8 approval order, and it provides a trigger, again, for  
9 the preparation of class list and the sending of the  
10 class notice by either the preliminary approval date  
11 or such other date if the Court wanted to set a later  
12 date. Frankly, I think we could eliminate that  
13 altogether, and if the Court wishes, I think after  
14 this proceeding today, we can submit an amended  
15 proposed preliminary approval order with these planned  
16 periods bracketed just so you have it, but I think we  
17 can do without that date. The next date is on page  
18 four, paragraph 10, and that is the deadline to  
19 postmark requests to opt out of the class.

20           THE COURT: That's the 40 days?

21           MR. AGOGLIA: 40 days, correct.

22           Moving to page five, paragraph 11, that's  
23 the setting of the fairness hearing. We would --

24           THE COURT: Here you're suggesting 120 days?

25           MR. AGOGLIA: 120 days, and the reason for

1 that, Judge, is so that --

2 THE COURT: Is to get it all done?

3 MR. AGOGLIA: Right.

4 And so you'd have 30 days to mail and that  
5 they'd have, you know, 50 days to consider opt out, 60  
6 days to object, that sort of thing. Those are pretty  
7 conventional timeframes.

8 MR. BENNETT: And, in fact, now, with the  
9 Class Action Fairness Act, I'm sure -- certain Your  
10 Honor is familiar with it, there is automatically a  
11 built-in period of at least 90 days notice that has to  
12 be sent out to the Attorneys General and --

13 MR. AGOGLIA: Paragraph 12, this is the  
14 deadline for briefs.

15 THE COURT: That would be 30 days?

16 MR. AGOGLIA: 30 days, objections. And --  
17 that's paragraph 13, page six.

18 THE COURT: That's right. Okay. I've got  
19 it.

20 If you want to send me a -- just file an  
21 amended with the suggested dates in it, that would be  
22 helpful, as well.

23 Now, let me ask you -- and this was alluded  
24 to, and the Court has to find this. Mr. Bennett  
25 talked about it earlier, this being a very -- a very

1 aggressively and toughly litigated and negotiated  
2 settlement. Do you believe there is any aspect at all  
3 of this case, Mr. Agoglia, of collusion to the  
4 detriment of class members whatsoever?

5 MR. AGOGLIA: No, and I would fully endorse  
6 his representation that this was fought tooth and nail  
7 on things that started with the disclosures of  
8 insurance policies and the initial disclosure that we  
9 started to hear to umbrella protective orders. There  
10 wasn't, I don't think, a single issue that wasn't  
11 litigated. I set many career firsts in terms of the  
12 number of issues that were litigated, and I will  
13 represent, as well, that this was a completely arm's  
14 length -- a tough negotiation overseen in substantial  
15 part by retired Judge Edward Infante, who, although  
16 expensive and distant and ultimately not able to  
17 deliver what this Court might have been able to  
18 deliver had we been before you, considered to be a  
19 mediator of unimpeached integrity, so that I can  
20 represent to you unqualifiedly.

21 THE COURT: And, you know, the Court -- this  
22 order also requires a finding that the settlement is  
23 preliminarily approved is fair, reasonable, adequate  
24 in light of the relevant and factual and practical and  
25 procedural considerations of the action, and I take it

1 you would fully endorse that.

2 MR. AGOGLIA: I would, Your Honor.

3 THE COURT: As did Mr. Bennett.

4 All right. And for the reasons we talked  
5 about earlier?

6 MR. AGOGLIA: Correct.

7 THE COURT: Because I was trying to figure  
8 out why you settled this case, but I'm -- and I  
9 appreciate you telling me.

10 MR. AGOGLIA: You know, Your Honor, and I  
11 said this to Mr. Bennett a couple of times, I would  
12 loved to have tried this case. You do, however, have  
13 to answer the question posed by good clients, Are you  
14 willing to risk having your tombstone read, Here lies  
15 the person who lost the \$3.5 million case that was  
16 supposed to be a slam dunk? I would have loved  
17 personally to have tried this. I have tried to  
18 articulate for you why with a \$3.5 billion potential  
19 exposure this is a rational economic settlement from  
20 the bank's perspective. That doesn't mean it does not  
21 stick in my craw.

22 THE COURT: Well, if you weren't -- if it  
23 didn't stick in your craw, you wouldn't be good at  
24 what you do, because that's just -- that's just the  
25 way it is, you know? There are many times -- and I'm

1 sure that Mr. Bennett would have loved to try to get  
2 3.5 billion in damages, too, you know. I mean,  
3 settlements are what they are. Lots of times, the  
4 folks on both sides are unhappy. I've mediated 400  
5 cases myself, or in that neighborhood. Lots of times,  
6 folks are unhappy, but at the end of the day, I  
7 believe it's a -- a settlement in general has  
8 significant advantages in terms of resolution of  
9 disputes, finality and -- and in terms of eliminating  
10 the highs and the lows.

11 MR. AGOGLIA: And I would say that that  
12 assessment of the strength of the defense here at this  
13 juncture leaves me to say I think this is a great deal  
14 for the class members. I think it's abundantly fair,  
15 reasonable and adequate, because, as you must, you  
16 have to consider what their walkaway alternative is,  
17 and I think the prospects of them coming through this  
18 with a recovery, which, as you know, is almost  
19 entirely bound up on proving a willful violation  
20 claim, was, at best, a long shot.

21 THE COURT: Do you have any idea what your  
22 fees are to date?

23 MR. AGOGLIA: My fees are to date?

24 THE COURT: I mean, just ballpark.

25 MR. AGOGLIA: I do not. If the Court wants

1 us to submit something in connection with your  
2 consideration of fees --

3 THE COURT: And that's pretty typical. I  
4 mean, at least I -- I would be curious to know how  
5 they compare. And I'm more interested from your  
6 standpoint of a total.

7 MR. AGOGLIA: Understood.

8 THE COURT: Total fees to date by -- and if  
9 you could get that by the 17th of December.

10 MR. AGOGLIA: We will submit it.

11 MR. BENNETT: We would agree if the Court  
12 would permit it to be in camera. We don't have an  
13 objection to that, you know, whatever, if that's --

14 MR. AGOGLIA: There is some sensitivity to  
15 that, but I understand the Court may want to publish  
16 that in its report and findings. I understand.

17 THE COURT: I don't have -- I don't see any  
18 reason why, given the amount at stake here, that you  
19 ought to be -- a \$3.5 billion potential recovery that  
20 you ought to be the least bit concerned about what the  
21 total amount of your fees are, and if you want to  
22 submit a request to have it considered in camera, you  
23 can do that, and I'll decide what I want to do with  
24 it.

25 MR. AGOGLIA: Understood, Your Honor.

1           THE COURT: Gentlemen, anything else you'd  
2 like to say?

3           Let me just ask you some of the same  
4 questions I just asked Mr. Agoglia.

5           From your standpoint, officer of the court,  
6 and this is kind of an offshoot of the question that I  
7 asked earlier, but just in looking at the order that  
8 you have provided, have you got any suggestion, any  
9 respect from anybody associated with this case that  
10 there is any collusion to the detriment of class  
11 members?

12           MR. BENNETT: Absolutely not, Judge. There  
13 has not been any at all. The -- I think that you can  
14 see that we're -- we both are advocating the  
15 settlement. We both are not -- but that we didn't  
16 script this hearing today, and I would suggest that  
17 each of the items that Mr. Agoglia went through,  
18 notice, the language in the claims form, the  
19 injunction, the mailing method, all of it was  
20 negotiated point by point by point. It was all -- I  
21 don't want to say contentious because that seems as if  
22 we were -- we weren't getting along. We weren't  
23 necessarily drinking friends, but we were -- we were  
24 professional in our dealings with one another and  
25 various team members, but we had to negotiate each of



1 these elements and each of these items, and I --

2 certainly, whatever Bank of America --

3 THE COURT: I know I could never get you to  
4 stick to a deadline.

5 MR. BENNETT: Well, Judge, it was -- the  
6 reason -- we were not simply snoozing. We were -- we  
7 would negotiate even to the eve of our  
8 end-of-the-month deadline to get the documents in.  
9 One reason that Your Honor has -- you know, with Rust,  
10 we had to get -- involve multiple third parties in  
11 determining even cost structures and the renegotiation  
12 of the dollar amounts was realizing the savings. I  
13 would also suggest, Judge, in terms of, you know,  
14 value produced that all these things -- all of these  
15 changes increase the quality of the notice, the  
16 quality of the process. I think it is as strong as  
17 any process that I have seen, observed or pitched  
18 for -- from the ease of submitting the claim, either  
19 in paper, on the computer, there is no test -- sign  
20 this under penalty of perjury, there is no, you know,  
21 Tell me the date of your mortgage and three secret  
22 facts only you would know. There is none of these  
23 impediments. I think that in truth, Mr. Agoglia has  
24 been a fair negotiator, and a number of his concerns  
25 were as to the effectiveness of the process, that is,

1 we didn't face -- and though we faced the negotiating  
2 opponent, we didn't face an individual who was  
3 attempting to obstruct or act in a way that might be  
4 improper. He obviously was negotiating for his  
5 client, but once we both were committed to making sure  
6 the notice informed the class, we both negotiated  
7 well. There is nothing about this, though, that I  
8 would say could be construed as collusion.

9 THE COURT: Mr. Agoglia characterized this  
10 as the gold standard, the best class notice he's ever  
11 seen, and I take that -- do you agree with that?

12 MR. BENNETT: I agree with that.

13 THE COURT: And therefore designed to get  
14 the most people from the class to opt -- to  
15 participate.

16 MR. BENNETT: Absolutely, and --

17 THE COURT: Because none of this works if  
18 five -- if five percent opt out, none of this works.  
19 This settlement goes away. Or no, the bank has the  
20 ability to pull the plug on it. The bank can make  
21 that judgment, correct, Mr. Agoglia?

22 MR. AGOGLIA: That's absolutely correct.

23 MR. BENNETT: If five percent of the class,  
24 though, expresses to this consumer advocate that  
25 they're not satisfied -- they think it's a failed

1 result, it's not successful. I mean, however we  
2 measure success, from my own success measure, that's  
3 not successful. Our attempt here is to get as much  
4 money as we can negotiate into the hands of these  
5 class members. That's the objective.

6 THE COURT: And Mr. Agoglia says this is a  
7 great deal for the class members, it's abundantly fair  
8 to them and the prospect of recovery for them if they  
9 had to prove willfulness was, at best, a long shot; do  
10 you agree with that?

11 MR. BENNETT: I agree that it was -- that  
12 the settlement is in proportion to the merits  
13 assessment that we have. I think I'm good at what I  
14 do, hopefully, Your Honor, but that we were able to  
15 negotiate that this value, in significant part, I  
16 think, because the discovery work that was done, and  
17 that -- we had arguments. I mean, it's -- it's a  
18 delicate position to be here. I don't want to argue  
19 that we filed a frivolous case. This was a case  
20 which -- that had merit, which we believe would  
21 survive summary judgment, but on the other hand, I  
22 agree that there are significant unknowns and  
23 challenges and impediments that would have kept these  
24 folks from recovery.

25 I think a critical question in any class

1 action, Your Honor, is how have class members  
2 themselves acted independent to the lawsuit. In this  
3 circumstance, these lawsuits both were filed in 2008.  
4 The statute would go back, you know, about two years  
5 before that, and to my knowledge, no class member has  
6 filed their own action independently. There are no  
7 individual actions. So absent our -- I mean, for no  
8 other reason than tolling the statute during the --  
9 for this period of time to preserve these claims, but  
10 for the filing of this case, none of the class members  
11 really would have any claims at all. The procedures  
12 were changed in September of 2008. None of these  
13 class members, had they not -- this not been for the  
14 class, would have a claim within the statute of  
15 limitations, and certainly, they haven't filed,  
16 probably, in part, because it's -- the value of the  
17 case, even were liability a slam dunk, it's  
18 challenging to find consumer advocates to take these  
19 cases or lawyers to take these cases, and also, in  
20 part, that a lot of folks don't know about these  
21 rights. One of the benefits of sending 3 million  
22 people a detailed explanation of their rights and  
23 access to the Web site (inaudible) it's a good thing  
24 and I'm sure that Bank of America would support an  
25 informed -- you know, this is not one of the less

1     reputable lenders out there, would support an informed  
2     consumer body. But again, I think it's a fantastic  
3     result.

4             THE COURT: Let me ask you a question, and  
5     it may -- it has no bearing on this issue, but I'll  
6     ask it anyway: Have you got other similar lawsuits  
7     pending against other lenders?

8             MR. BENNETT: We have -- we have -- had one  
9     other case against a company called Downey Savings and  
10    Loan that was taken over by the FDIC, and we settled  
11    that case on unrelated claims. There was --

12            THE COURT: On a class basis?

13            MR. BENNETT: No, an individual case. There  
14    were -- we had a separate Truth in Lending Act --

15            THE COURT: Are you aware of any similar  
16    class cases pending under this statute against other  
17    lenders elsewhere in the U.S.?

18            MR. BENNETT: I'm not, and I think, you  
19    know --

20            THE COURT: Mr. Agoglia, are you aware of  
21    any?

22            MR. AGOGLIA: Other than the Downey case,  
23    which counsel has spoken to; otherwise, no, I'm not.

24            MR. BENNETT: But there aren't that many of  
25    us that do this, so I think I would have a pretty

1 good --

2 THE COURT: There are a lot of lawyers out  
3 there, though, Mr. Bennett.

4 MR. BENNETT: There are, but there aren't  
5 that many foolish lawyers that start off taking  
6 Automobile Repair Facility Act cases in General  
7 District Court in Newport News and try to learn how to  
8 make a living off it. There aren't that many consumer  
9 advocates. There are fewer still that have been  
10 qualified for class action litigation.

11 THE COURT: All right. Anything else that  
12 either side wants to say?

13 I -- let me ask you gentlemen this, one  
14 other question: What makes sense to you in terms  
15 of -- is there any particular timing that you need  
16 from the Court, in terms of the -- I mean, do you need  
17 me to do this within 10 days? 30 days? 60 days? Are  
18 there any things that I'm not aware of that might pose  
19 some problems or issues or concerns?

20 MR. BENNETT: There are two issues, and this  
21 is what discussing -- trying to balance our scheduling  
22 of this today with Mr. Cupp not here, as well as --

23 THE COURT: Well, that certainly --

24 MR. BENNETT: -- filing of attorneys' fees.

25 THE COURT: That's part of the reason why I

1 asked the question.

2 MR. BENNETT: Yes, sir.

3 Two things. The first is just the time  
4 value of money.

5 THE COURT: Interest is huge.

6 MR. BENNETT: Yes, sir.

7 But the second is, the longer you go through  
8 a class action process, the more difficult it becomes  
9 to guarantee you're going to reach every class member  
10 because addresses can change. We used the September  
11 of '09 date for the scrub process. To the extent that  
12 we have approval within a timeframe that Your Honor  
13 would probably render a decision anyway, that's  
14 probably moot, but certainly, if we waited until March  
15 or February, that's -- you're increasing by three or  
16 four months the individuals that we have to rely  
17 simply on skiptraces or NCOA for.

18 THE COURT: Okay. So it really bears on the  
19 quality of the database, because that's -- that was  
20 sort of triggered at the end of September.

21 MR. AGOGLIA: The -- that's right.  
22 September was the date on which we took a snapshot of  
23 who had paid off and then who would be sent through  
24 this additional updating protocol and looking at  
25 central repository and then updating with LexisNexis,

1 so that is a date out there. I would say, however,  
2 that the sort of class periods and well before that,  
3 it -- you know, both on the ACAPS system and the  
4 Legacy system, because the systems changed to this new  
5 (inaudible) very soon, protocol, but other than what  
6 Mr. Bennett said, I'm not aware of any other external  
7 drivers of deadlines.

8 THE COURT: The system that Bank of America  
9 uses now, is that consistent with the system that's  
10 set forth in the injunctive relief in this --

11 MR. AGOGLIA: It's exactly one and the same.

12 THE COURT: And does it already exist?

13 MR. AGOGLIA: Yes.

14 THE COURT: It's already working?

15 MR. AGOGLIA: We have already instituted  
16 that, so --

17 THE COURT: ACAPS and Legacy are gone?

18 MR. AGOGLIA: Actually, ACAPS still exists.  
19 Legacy has been reduced from collection three to one  
20 system, and those are described in Marti Smith's  
21 declaration, and the timing, how they do it is  
22 described, I think, at least in terms that will allow  
23 you to familiarize yourself, but there is still an  
24 ACAPS system. That is what is being used to originate  
25 home equity loans and home equity lines of credit, and



1     there is still a Legacy system. The real functional  
2     difference between the two is with the Legacy system,  
3     they use an outside vendor to mail, and for the ACAPS,  
4     for historical reasons and system compatibility  
5     issues, they use their own internal mail processing  
6     facility up in Massachusetts.

7             THE COURT: But in terms of the notice, it's  
8     being done consistent with the injunction being set  
9     forth and the settlement?

10            MR. AGOGLIA: It is, Your Honor.

11            THE COURT: All right. Mr. Agoglia,  
12     anything else further from you?

13            MR. AGOGLIA: No. The one thing I would say  
14     is to the extent that the -- if the Court were to  
15     enter a preliminary approval order close to the  
16     holiday, it would complicate the administration issue,  
17     so if the Court -- frankly, if the Court is going to  
18     consider it, I would -- for files this size, I would  
19     much prefer for them to transfer early January or mid  
20     December rather than late December, because you can  
21     really run into some serious problems with 2.2 million  
22     transaction records if you don't have your best people  
23     working on it.

24            THE COURT: All right. Fair enough. I  
25     appreciate that.

1 All right. Anything else from the  
2 plaintiff?

3 MR. BENNETT: No, sir. Thank you.

4 THE COURT: Gentlemen, thank you. I  
5 appreciate a great deal the way in which we've been  
6 able to have a dialogue about these issues and the  
7 concerns that -- or at least the questions that I had;  
8 not necessarily concerns. If there is anything else  
9 that occurs to you in the next few days, if you want  
10 to send me anything else in writing, please feel free  
11 to do that. I will look at it, and I'll try to turn  
12 this around just as soon as I can. I've got lots of  
13 stuff going on, as you can imagine, but I will do that  
14 just as soon as I can, mindful of what you said,  
15 Mr. Agoglia, about the -- what you have to do and  
16 mindful about the interest, mindful about the accuracy  
17 of the database and mindful about the holidays. I'll  
18 turn this around as soon as I can.

19 MR. AGOGLIA: We appreciate you taking the  
20 amount of time you've taken with the parties.

21 THE COURT: All right.

22 MR. BENNETT: Thank you, Your Honor.

23 THE COURT: Thank you all very much.

24

25 (Proceedings concluded at 1:52 p.m.)

1 CERTIFICATE OF COURT REPORTER

2

3

4 I, L. Michelle Flanary, do hereby certify  
5 that I recorded verbatim the proceedings in the United  
6 States District Court for the Western District of  
7 Virginia, Harrisonburg Division in the captioned  
8 cause, heard by The Honorable Michael F. Urbanski,  
9 Judge of said Court, on November 18, 2009.

10 I further certify that the foregoing pages,  
11 numbering 1 through 107 inclusive, constitute a true,  
12 accurate and complete transcript of said proceedings.

13 Given under my hand this 9th day of  
14 December, 2009.

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L. Michelle Flanary

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